Supreme Court, U.S.
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92-746

IN THE

Supreme Court of the United States

October Term, 1992

MARTIN J. HUGHES,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the legislative aim underlying the thirteen year disqualification from holding union office pursuant to 29 U.S.C. Section 504(a) is to punish or is merely a restriction which is a relevant incident to a regulation.

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OPINIONS BELOW

The following court rulings are found in the Appendix:

1. Memorandum and Order of the United States District Court for the Northern District of Ohio dated July 25, 1986;

2. Memorandum and Order of the United States District Court for the Northern District of Ohio dated October 20, 1986;

3. Memorandum and Order of the United States District Court for the Northern District of Ohio dated November 13, 1987;

4. Order of the United States Court of Appeals for the Sixth Circuit denying defendant's petition for writ of mandamus and motion for stay dated November 21, 1986;

5. Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit dated April 4, 1990 (reported as *Hughes v. United States*, 899 F.2d 1495 (6th Cir. 1990);

6. Order of the United States Court of Appeals for the Sixth Circuit denying defendant's motion for rehearing dated May 21, 1990;

7. Order of the United States Court of Appeals for the Sixth Circuit granting motion to stay issuance of mandate pending application to the United States Supreme Court for writ of certiorari dated June 12, 1990;

8. Memorandum and Order of the United States District Court, Northern District of Ohio, Eastern Division (August 1, 1991);

9. Memorandum and Order of the United States District Court, Northern District of Ohio, Eastern Division (September 5, 1991);

10. Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit dated May 13, 1992 (reported as *Hughes v. United States*, 964 F.2d 536 (6th Cir. 1992)); and

11. Order of the United States Court of Appeals for the Sixth Circuit Denying Petition for Rehearing and Suggestion for Rehearing En Banc (July 30, 1992).

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on May 13, 1992. Petitioner filed a Petition For Rehearing And Suggestion Of Rehearing En Banc on May 27, 1992 which was denied by the Sixth Circuit on July 30, 1992. This petition has been filed within ninety days of the Court's Order denying Petitioner's Motion for Rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The question presented raises a statutory issue regarding the disqualification provisions of Section 504(a) of the Landrum-Griffin Act, The Labor Management Reporting and Disclosure Act ("LMRDA") 29 U.S.C. §504(a), see p. A89. The question presented, also, raises a constitutional issue regarding the United States Constitution's provision that "No Bill of Attainder or ex post facto Law shall be passed." U.S. Const. Art. I, §9, cl. 3.

STATEMENT OF THE CASE

This petition presents a very narrow issue for review, whether *United States v. Brown*, 381 U.S. 437 (1965), remains controlling authority in its conclusion that disqualification from Union office under 29 U.S.C. §504(a) is punishment within the meaning of Article I, Section 9 of the United States Constitution.

In July, 1987, Mr. Martin J. Hughes was convicted in the United States District Court for the Northern District of Ohio on two counts of violating 18 U.S.C. §1001. Following appeal on matters unrelated to the issue presented by this petition, Mr. Hughes was sentenced on August 1, 1991, by the district court. Under authority of the disqualification provisions contained within 29 U.S.C. §504(a), the district court imposed a thirteen year disqualification from union office on Mr. Hughes.

Mr. Hughes' convictions under 18 U.S.C. §1001 arose from acts committed in 1982 and 1983. Mr. Hughes was convicted of the filing of false LM-2 reports to the Department of Labor. It is not disputed by the United States that at the time of Mr. Hughes conduct, specifically 1982 and 1983, the disqualification provisions of Section 504(a) were not triggered by a violation of 18 U.S.C. §1001. Section 504(a) did not include violation of 18 U.S.C. §1001 until it was amended in 1984. Because of the retrospective application of Section 504(a) disqualification to Mr. Hughes, he appealed his sentence as violative of the United States Constitution's prohibition against ex post facto laws. The Court of Appeals rejected this contention on May 13, 1992. See p. A1. On May 27, 1992, Mr. Hughes filed a Petition for Rehearing and Suggestion for Rehearing En Banc

("Petition for Rehearing") of the Appellate Panel's Opinion, specifically seeking review of the Court's mistaken determination that application of the Section 504(a) disqualification to him did not constitute retrospective application of a penalty in violation of the Constitution's ex post facto prohibition. This Petition was denied by Order of The Sixth Circuit on July 30, 1992.[1] See p. A86. This Petition for Writ of Certiorari timely followed.

[1] It should be noted that the evidence establishes that Petitioner Hughes was not personally enriched in any manner and did not receive any funds either directly or indirectly; rather, the convictions involved record keeping violations.

ARGUMENT

I. BECAUSE THE COURT OF APPEALS FOR THE SIXTH CIRCUIT'S DETERMINATION THAT THE THIRTEEN YEAR DISQUALIFICATION PROVISION IN 29 U.S.C. SECTION 504(A) DOES NOT CONSTITUTE PUNISHMENT IS INCONSISTENT WITH BINDING PRECEDENT OF THIS COURT, THIS COURT SHOULD FIND THAT THE RETROSPECTIVE APPLICATION OF 29 U.S.C. SECTION 504(A) TO MARTIN J. HUGHES CONSTITUTED A VIOLATION OF THE UNITED STATES CONSTITUTION'S PROHIBITION AGAINST EX POST FACTO LAWS.

The ex post facto clause mandates that "[n]o . . . ex post facto law shall be passed." U.S. Const. Art. I, Sec. 9, cl. 3. In *Weaver v. Graham*, 450 U.S. 24 (1981), the Supreme Court held that the Constitution's ex post facto prohibition forbids the Congress from enacting any law which "imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." 450 U.S. at 28 (quoting *Cummings v. Missouri*, 4 Wall 277, 18 L. Ed. 356 (1867). In *Miller v. Florida*, 482 U.S. 423 (1987), the Supreme Court reaffirmed that "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, *when committed*" violates the ex post facto clause of the United States Constitution. *Id.* at 429 (emphasis added) (quoting *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648 (1798)). The prohibition on ex post facto laws serves two goals fundamental to the preservation of a free society: (1) it assures that legislative acts give fair warning of their effect and permits individuals to rely on their meaning until explicitly changed; and (2) it restricts governmental power by restraining arbitrary and potentially vindictive

legislation. *Weaver*, 450 U.S. at 28-29; *accord Miller*, 482 U.S. at 429-30. Both of these goals have been undermined by the present application and interpretation of 29 U.S.C. §504(a) to Mr. Hughes.

According to the Supreme Court, an ex post facto law is one that (1) is a criminal or penal measure; (2) is retrospective, that is, it applies to events occurring before its enactment; and (3) disadvantages the offender because it imposes a greater punishment. *Miller*, 482 U.S. at 430; *Weaver*, 450 U.S. at 29 (1981). In this case, the second and third requirements have clearly been satisfied by the facts of this case and in essence conceded by the United States.[2] The key question for analysis is whether the statute constitutes a regulatory or penal measure.

Martin J. Hughes was convicted under 18 U.S.C. §1001 for actions committed by Mr. Hughes in 1982 and 1983 at the Communication Workers of America. At the time of this conduct, a conviction under 18 U.S.C. §1001 did not implicate Section 504(a) of the Landrum-Griffin Act. As the Sixth Circuit noted:

> . . . in 1982 and 1983, section 1001 offenses were not among the listed offenses giving rise to section 504(a) disability. *U.S. v. Hughes*, 964 F.2d 536 (6th Cir. 1992).

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[2] During March 1982 and April 1983, the time during which Mr. Hughes engaged in the conduct which formed the basis for his convictions under 18 U.S.C. §1001, abuse or misuse of a position with a labor union, was not an offense for which a disability provision of 29 U.S.C. §504 was applicable. Further, there can be no dispute that the ability to impose a thirteen-year disability from holding union office for offenses, which had previously not been subject to such disability, disadvantages a defendant. *See, Miller*, 482 U.S. at 430-33; *Weaver*, 450 U.S. at 33.

However, Section 504(a) was amended in 1984 to include Section 1001 offenses. While the amendment became effective October 12, 1984, its provisions explicitly state it is applicable to any conviction after October 12, 1984, regardless of when the underlying conduct might have occurred. *Id.*, at 539.

Mr. Hughes claimed before the Sixth Circuit and contends today that retroactive application of a punitive measure, such as this, violates the United States Constitution's prohibition against ex post facto laws. The Sixth Circuit rejected this analysis and found that the retrospective application of Section 504(a) to Mr. Hughes was constitutional, because the prohibition against holding union office and exercising First Amendment rights was not the type of punishment the ex post facto clause sought to prevent. This conclusion directly contradicts an express determination by the United States Supreme Court, *United States v. Brown*, 381 U.S. 437 (1965), and is inconsistent with other opinions of this Court.

A. The disqualification provisions in 29 U.S.C. Section 504(a) constitute "punishment" for the purposes of ex post facto analysis.

In this case, the statute at issue, 29 U.S.C. §504, which imposes a disability from holding union office for persons who are convicted of certain enumerated crimes, is a penal or criminal measure. *See, e.g., United States v. Jalas*, 409 F.2d 358 (7th Cir. 1969); *see also* Comprehensive Crime Control Act of 1984, H. Rep. No. 98-1030, Sept. 17, 1984, *as reprinted in* 1984 U.S. Cong. Code & Admin. News, at 297-99 (intent of provisions of Comprehensive Crime Control Act of 1984, which increased the crimes that would disqualify an individual

from holding certain positions with a labor union was to increase available penalties because the penalties used to protect labor relations had proven to be "inadequate"). This Court has consistently held that disqualification provisions constitute a form of punishment under constitutional analysis. The *United States v. Brown* court stated:

> Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment. 381 U.S. 437, 448 (1965) (quoting *Cummings v. Missouri*, 4 Wall 277, 320).

In *United States v. Brown*, the Supreme Court found that the provision of the Landrum-Griffin Act that made it a crime for a past member of the communist party to hold labor union office, 29 U.S.C. §504(a), constituted a Bill of Attainder. 381 U.S. 437. Directly at issue in the *Brown* case was the argument that Section 504(a) did not constitute a Bill of Attainder because the prohibition it imposed was not "punishment." It was contended by the Solicitor General that the statute was enacted for preventive rather than retributive reasons. Specifically, the Solicitor argued that the disqualification was necessary to ensure that certain persons were kept from positions where they could bring about undesirable results. *Id.*, at 457. The Supreme Court summarily disposed of this contention:

> It would be archaic to limit the definition of "punishment" to "retribution". Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to

> keep them from inflicting future harm, but that does not make imprisonment any the less punishment. *Id.*, at 458.

The Court ultimately concluded "it . . . clearly appears that Section 504 inflicts punishment within the meaning of the Bill of Attainder Clause." *Id.* Therefore, this Court has definitively ruled that §504 constitutes punishment for purposes of the Bill of Attainder clause.

The Circuit Court failed to observe and defer to the Supreme Court's previous binding determination that the legislative aim of the disqualification provisions of Section 504(a) was punitive. This preliminary determination characterized Section 504(a) as punitive for all analysis, ex post facto or Bill of Attainder.

B. An action considered to be punishment for Bill of Attainder analysis is punishment for purposes of ex post facto analysis.

A judicial determination that a legislative enactment constitutes "punishment" for Bill of Attainder analysis is equally applicable to ex post facto analysis. The Sixth Circuit attempts to distinguish *Brown* by noting that:

> . . . the *Brown* opinion addressed the Bill of Attainder Clause and was not intended as a disposition of an *ex post facto* challenge to this provision. *U.S. v. Hughes*, 964 F.2d 536, 541 (9th Cir. 1992).

However, the Sixth Circuit's argument is merely a distinction without a difference. A series of United States Supreme Court opinions concerning Bills of Attainder and ex post facto laws have established that a determination that a statute violates either the Bill of Attainder or ex post facto prohibition, requires a prerequisite determination that the underlying legislative

aim of the statute is punitive. A determination of legislative aim must *precede* any eventual conclusion that a statutory provision is a Bill of Attainder or ex post facto law. Once this preliminary determination has been made, subsequent scrutiny of the statute for a Bill of Attainder or ex post facto deficiency is secondary; it has no bearing on the preliminary determination of legislative purpose.

In its earliest opinions on the subject, the Supreme Court discussed the technical meaning of the words ex post facto when applied to law. *See, Calder v. Bull*, 3 Dall. 386, 395 (1798)). *In Ex Parte A. H. Garland*, 71 U.S. 366 (1867), the Court determined whether disqualification from a profession for past conduct was punishment. The Court stated:

> [A]nd exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct. The exaction of the oath is the mode provided for ascertaining the parties upon whom the Act is intended to operate, and instead of lessening, increases its objectionable character. All enactments of this kind partake of the nature of bills of pains and penalties and are subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included.
>
> In the exclusion which the statute adjudges, it imposes a punishment for some of the acts specified which were not punishable at the time they were committed; and for other of the acts it adds a new punishment to that before prescribed, and it is thus brought within the further inhibition of the Constitution against the passage of an ex post facto law. In the case of *Cummings v. Missouri*, just decided, we have had occasion to consider at length the meaning of a bill of attainder and of an ex post

> facto law in the clause of the Constitution forbidding their passage by the States, and it is unnecessary to repeat here what we there said. *Ex Parte A.H. Garland*, 71 U.S. 366, 370 (1867).

In *Cummings v. Missouri*, 71 U.S. 356 (1867), the Court determined "disqualification from office may be punishment, as in cases of conviction upon impeachment." In *Cummings*, the Court's concern was whether the exclusion from office at issue was intended as punishment, which could be effected in the form of an ex post facto law or a bill of attainder. 71 U.S. at 364. The *Cummings* disqualification was found to be punitive. The outcome was the same in *Ex Parte A. H. Garland*.

The Sixth Circuit next contends that its resolution of this case is required by this Court's holding in *DeVeau v. Braisted*, 363 U.S. 144 (1960),[3] where the Supreme Court upheld a New York statute (referred to hereinafter as §8) that disqualified all felons, past or present, from union office. However, this position is contrary to both the applicable law and simple logic. *DeVeau* articulates the focal point of ex post facto analysis to be:

> Whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation. . . . *DeVeau*, 363 U.S. at 160.

In *Hawker* and *DeVeau*, it was determined that the legislative aim in relation to both statutes in question was to regulate not punish. Accordingly, retrospective application of the statutes under review in *DeVeau* and *Hawker* did not violate the ex post facto clause. However, these rulings in no way indicate that 29 U.S.C.

[3] The Sixth Circuit also cites approvingly *Hawker v. New York*, 170 U.S. 189.

§504(a) is somehow not punitive in nature.[4] Since the legislative aim in *DeVeau* and *Hawker* was found to be regulatory, retrospective application of the disqualification under the statutes in questions there, did not violate the Constitution's ex post facto prohibition. This does not, however, insulate any legislative enactment, disqualifying persons convicted of felonies from office, even if the stated aim of the legislation in question is punitive, from ex post facto invalidation. The *Brown* ruling unequivocally makes this point.

In *Brown*, notwithstanding the holding in *DeVeau* that the New York waterfront statutory scheme was regulatory and could for this reason be applied retrospectively, the Court found that Section 504(a) disqualification was intended to be punitive. In no opinion of the Supreme Court has the question of whether a legislative enactment is punitive turned on whether the ultimate inquiry was bill of attainder versus ex post facto based. The decisive issue is simply one of whether punishment or regulation was intended.

[4] Contrary to the Court of Appeal's assertion, following *Brown* does not require the overruling of *DeVeau*. *DeVeau* simply stated that Section 8, the New York statute under review, could be applied retrospectively. *Brown* states Section 504(a) may not be applied retrospectively. Retrospective application of Section 504 was not the issue in *DeVeau*, it was retrospective application of Section 8 *only*. *DeVeau* did not hold that Section 504 was regulatory. *DeVeau* merely held Section 504 did not preempt Section 8.

The Court of Appeals cites *Postma v. Int'l Brotherhood of Teamsters*, 337 F.2d 609 (2d. Cir. 1964) as support for the proposition that Section 504(a) is regulatory. *Postma* was decided in 1964, prior to the United States Supreme Court determination in 1965 in *Brown* that Section 504(a) is punitive. Moreover, *United States v. Jalas*, 409 F.2d 358 (7th Cir. 1969) the only Circuit Court of Appeals opinion since *Brown* to deal with the issue of whether Section 504 is punitive, determined unequivocally that Section 504 is a punitive statute.

Legislation does not have split intent as suggested by the Court of Appeals. A measure is either punitive or regulatory.

As stated in *DeVeau:*

> The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation. . . . *DeVeau* at 160.[5]

The Court of Appeals suggests that *Brown's* finding that Section 504 is punitive is limited to a Bill of Attainder analysis. This is incorrect. Under the passages cited above in *Brown* and *DeVeau*, the central question focuses upon the character of the disability imposed. Once the character of a disability has been determined, it is unsound reasoning to suggest that it may change when the ultimate question is different. *Brown* found Section 504 disability to be punitive. The Sixth Circuit was bound by this determination and simply refused to follow *Brown*.

[5] The dissent in *Brown* noted: "When an enactment is challenged as an attainder, the central inquiry must be whether the disability imposed by the act is *punishment* . . . or is *regulation* . . .." *Brown* at 463.

CONCLUSION

Because the Court's review is needed to confirm the punitive nature of the sanction imposed pursuant to 29 U.S.C. §504(a) with respect to the United States' Constitutional prohibition against ex post facto laws, to resolve the conflicting interpretations of this statute between the United States Supreme Court and the Courts of Appeals, and to clarify the effect the *United States v. Brown*, *supra*, ruling has on the *DeVeau v. Braisted*, *supra*, opinion, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

JUDGMENT ENTRY OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed May 13, 1992)

No: 91-3720

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARTIN J. HUGHES,
Defendant-Appellant.

Before: MARTIN and RYAN, *Circuit Judges*; WILHOIT, *District Judge*

JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Clerk

A True Copy.

Attest:

/s/ VALERIE FIELDER
Deputy Clerk

Issued as Mandate: August 11, 1992

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided and Filed May 13, 1992)

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 91-3720

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARTIN J. HUGHES,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Before: MARTIN and RYAN, *Circuit Judges*; and WILHOIT, *District Judge.**

BOYCE F. MARTIN, JR., *Circuit Judge.* Martin Hughes, a former labor union official, appeals his sentence for various violations of the Internal Revenue Code and federal false statements statutes. In *Hughes v.*

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* The Honorable Henry R. Wilhoit, Jr., United States District Judge for the Eastern District of Kentucky, sitting by designation.

United States, 899 F.2d 1495 (6th Cir. 1990), this court addressed Hughes' first appeal in this case. We affirmed in part and reversed in part the district court's decision and remanded the case for re-sentencing. Hughes is presently appealing the re-sentencing. For the following reasons, we affirm Hughes' sentence.

Martin Hughes was charged and found guilty of breaching his trust as the manager of a union branch of the Communication Workers of America. We need not recite the facts surrounding his conviction because they are found in *Hughes*, 899 F.2d at 1495. To put the present appeal in context, however, we need to detail the terms of both Hughes' original sentence and his new sentence.

Hughes' first sentencing occurred on November 13, 1987. At that time, the district court sentenced Hughes to two years probation for assisting in the filing of false W-2 tax forms and fined Hughes $10,000 for ten counts of falsifying union records. In addition, the court imposed on Hughes a three-year civil and employment disability, as authorized by 29 U.S.C. §504 of the *Labor Management Reporting and Disclosure Act of 1959*. The disability imposed by the court barred Hughes from representing or serving as an officer in Communication Workers of America for three years. The district court's imposition of the three-year term represented a discretionary reduction downward from section 504's automatic imposition of a *thirteen*-year disability. The court reduced the disability to three years because it believed Hughes' conduct resulted from a misguided but benign interest in helping his union.

Thereafter, the parties initiated their first appeal to this court. On January 13, 1988, we stayed imposition of the three-year disability pending completion of the

appeals process. On April 4, 1990, we affirmed Hughes' conviction and sentence with two exceptions. First, we ordered the reinstatement of the felony convictions contained in counts thirty-six and thirty-seven of the indictment. These counts were for making false statements on labor reporting documents, in violation of 18 U.S.C. §1001. Second, we ordered the district court to reduce the felony conviction for count thirty-four, which regarded falsified W-2 forms, to a misdemeanor.

Hughes sought certiorari from the United States Supreme Court. While petition for review was pending, Hughes requested that we continue to stay his disability. We granted his request for a continued stay on June 12, 1990. Thereafter, the Supreme Court denied his request for certiorari. The stay expired on December 5, 1990, after we issued a mandate ordering re-sentencing and formally terminating the appeals process.

The district court re-sentenced Hughes on August 1, 1991, after two days of hearings. The court heard additional evidence that, the court stated, had a "bearing on the efficacy of any sentence to be imposed." The new evidence demonstrated that, since the time of his original sentencing in 1987, Hughes had continued to meddle in the affairs of the Communication Workers of America. Even though Hughes was dismissed from his vice-president position three days after his original sentencing, he persisted in attempting to control Communication Workers of America activities by (1) maintaining his old office, (2) giving orders to union secretaries, and (3) controlling funds without authorization. Hughes apparently utilized his former office space through the summer of 1988 and only left after the union ordered him to leave. Additional evidence at the re-sentencing hearing showed Hughes interfered

with three union accounts that contained significant amounts of money. The court's re-sentencing determination noted that because Hughes' offenses were commited prior to the *Sentencing Reform Act of 1984*, the court had broad discretion in the way in which it could fashion a new sentence.

On appeal, Hughes protests the court's consideration, at re-sentencing, of matters that occurred following Hughes' first appeal. Hughes' complaint is not directed at the court's specific factual determinations, but rather against the district court's ability to consider such subsequent conduct. We reject this claim and note that the district court has broad discretion to consider information in a sentencing determination.

Count thirty-four charged Hughes with violating 26 U.S.C. §7204. Hughes was found guilty of violating section 7204 for furnishing an employee of United Telephone Credit Union with a false W-2 form. Under this misdemeanor conviction, the district court could have ordered Hughes to pay a $1,000 fine, could have sentenced him to one year in prison, or both. At re-sentencing, the court imposed two years probation instead of the maximum penalties allowed under law. Moreover, the court found Hughes exempt from serving this probation because Hughes had already served two years probation for the felony conviction under the same count. *See North Carolina v. Pearce*, 595 U.S. 711, 716 (1969) (court should reduce probation period to reflect time already served).

Counts thirty-six and thirty-seven of the indictment charged Hughes with violating 18 U.S.C. §1001, which prohibits falsification of information given to government agencies. Hughes violated this section when he caused the Communication Workers of America to file

false "LM-2" reports with the Department of Labor. Unions annually submit LM-2 reports to the Department of Labor. The reports disclose the salary and expenses of employees who receive more than $10,000 during the year. If convicted under section 1001, a person could have to pay up to $10,000 in fines, serve up to five years in prison, or both. At re-sentencing, the district court suspended Hughes' sentence under both counts, and ordered three years of probation for each count, running concurrently.[1]

The district court then considered whether it was still appropriate to reduce Hughes' automatic civil employment disability from thirteen years to three years, given this court's order reinstating the felony convictions under counts thirty-six and thirty-seven. The district court found that reduction of the automatic disability was now inappropriate in light of Hughes' conduct since his first sentencing. Specifically, the court found that "his actions demonstrate[d] a general contempt for the existing authority of the union." The court noted that section 504 was designed to purge the labor movement of its criminal element and to prevent convicted union leaders from regaining control of union government. The court emphasized that it was not sentencing Hughes to the thirteen-year disability *because* of his actions since the original sentencing. The court stated that, in order to

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[1] During the initial re-sentencing, the district court sentenced Hughes to five years of probation on counts thirty-six and thirty-seven. After finding that (1) Hughes had already served two years probation under counts thirty-three and thirty-four, and (2) this two years went towards the five-year sentence for counts thirty-six and thirty-seven, the court reduced the five year probationary period for counts thirty-six and thirty-seven. The court found that a reduction was required under 18 U.S.C. §2661, which prohibits consecutive terms of probation totaling more than five years on separate counts of *one* indictment.

give full effect to the statute's provisions, it was merely refusing to exercise its discretion to reduce a statutorily required thirteen-year period. Under the court's order, Hughes may not exercise "any decision-making authority over any organization, committee, or account that receives any of its funds from a labor organization and/or its members for the purpose of contributing money to political candidates" during the time he is subject to the section 504(a) disability.

Shortly after re-sentencing, the district court amended its re-sentencing order to credit Hughes for time already served under the thirteen-year disability. The court found that the disability first became effective on November 13, 1987, which is when the court originally sentenced Hughes. The district court ruled that our stay, which we issued on January 13, 1988, tolled the disability period from that date until December 5, 1990, which is the date the district court received the mandate ending the appeals process. Accordingly, the district court reduced Hughes' thirteen-year civil and employment disability by the nine months and twenty-six days Hughes had already served under the disability.

Hughes makes four arguments on appeal. First, Hughes argues that the thirteen-year disability under section 504 is a violation of the United States Constitution's *Ex Post Facto* Clause because the disability imposes punishment on Hughes in excess of the punishment that could have been imposed lawfully at the time the criminal conduct occurred. Second, Hughes argues that the Double Jeopardy Clause precludes imposition of a sentence for count thirty-six because the conduct underlying count thirty-six also formed the basis for count thirty-four. Third, Hughes complains that the language of the district court order pertaining to the

disability provision is overly broad and violates Hughes' First Amendment right to freedom of association. Finally, Hughes argues that the district court erred in calculating the amount of credit he should receive for time he had already served under the section 504 disability. For the reasons described below, we reject all of Hughes' arguments.

Hughes argues that imposition of a thirteen-year disability for his conduct with regard to counts thirty-six and thirty-seven represents an *ex post facto* imposition of punishment because the statutory disability for this conduct was enacted subsequent to the occurrence of Hughes' criminal behavior. The government responds that this issue is controlled by Supreme Court case law that holds that legislative restrictions on convicted felons that are enacted as a means of preventing corruption in areas subject to governmental regulation are not *ex post facto* laws even if applied retrospectively. Thus, according to the government, the provisions in section 504(a) do not constitute criminal "punishment."

The sequence of events is undisputed. Hughes was convicted in November, 1987, under counts thirty-six and thirty-seven for violating 18 U.S.C. §1001, which prohibits falsification of information given to government agencies. This conviction was based on conduct undertaken by Hughes while he worked at the Communication Workers of America in 1982 and 1983. At the time of Hughes' criminal activity, the *Labor Management Reporting and Disclosure Act of 1959* imposed disabilities on persons convicted of certain criminal offenses by preventing them from engaging in union activities; *however, in 1982 and 1983, section 1001 offenses were not among the listed offenses giving rise to section 504(a) disability. See* 29 U.S.C.A. §504. In 1984,

Congress amended section 504(a) and increased the number of offenses that give rise to disability, including section 1001 violations. The amendment, which became effective on October 12, 1984, applies to *any judgment or conviction entered after October 12, 1984, notwithstanding the date of the conduct that constituted the event.* Hughes was convicted and sentenced in 1987.

We must ascertain whether or not this legislation represents the retroactive application of punishment or, indeed, is merely a legislative device aimed at strengthening regulations in an area susceptible to corruption. Hughes does not dispute that the statutory language of amended section 504(a) clearly permits application of the disability provision to his conduct in 1982 and 1983. However, Hughes argues that the statute, as applied, constitutes an *ex post facto* law.

We would begin by noting that the Supreme Court has held similar forms of legislation to be non-penal in nature. In *De Veau v. Braisted,* 363 U.S. 144 (1960), the Supreme Court upheld the constitutionality of the *New York Waterfront Commission Act of 1953.* This act prohibited union officers and agents who had been convicted of a felony from collecting union dues or other funds from union employees. Even though the Supreme Court found the act disqualified convicted felons from union office, *id.*, at 157-58, it held that barring convicted felons from certain employments was a familiar legislative device to ensure against corruption in specified, vital areas. *Id.* at 158-59. In specifically addressing the *ex post facto* challenge to the act, the Court stated:

> The mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for past acts. The question in each case where unpleasant

> consequences are brought to bear upon an individual for prior conduct, is *whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of present situation*, such as the proper qualifications for a profession.

Id. at 160 (emphasis added). According to the Court, the purpose of the statute was not to punish ex-felons but to regulate the waterfront and, therefore, the statute was not an *ex post facto* law. *See also Hawker v. New York*, 170 U.S. 89 (1898) (upholding New York statute making it a misdemeanor for anyone convicted of a felony to practice medicine). Similarly, in *Fleming v. Nestor*, 363 U.S. 603, 613 (1960), the Court held that

> [w]here the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected.

One circuit court has addressed and rejected an *ex post facto* challenge to section 504(a). *See Postma v. Inter. Bro. of Teamsters*, 337 F.2d 609 (2d Cir. 1964) (upholding retroactive imposition of disability in the 1959 version of section 504). The Second Circuit in *Postma* found the Supreme Court rationale in *De Veau* completely controlled any *ex post facto* analysis. We agree with the Second Circuit's rationale. The 1984 amendment to section 504(a), which simply expands the list of criminal statutes subject to section 504(a)'s disability provisions, does not change the propriety of the *Postma* analysis.

Hughes argues, however, that *United States v. Brown*, 381 U.S. 437 (1965) is direct precedent in support of his proposition that section 504(a)'s disability is penal in nature. In *Brown*, the Supreme Court found that a

portion of section 504, which made it a criminal act for a member of the communist party to serve as an officer or employee of a labor union, acted as a bill of attainder by inflicting punishment without trial on such persons. *Id.* at 448-49. To support his claim that the section 504(a) disability is a form of punishment, Hughes points to the Court's statement that "section 504 inflicts 'punishment' *within the meaning of the Bill of Attainder Clause.*" *Id.* at 457 (emphasis added). Hughes argues that this statement renders the application of section 504(a) in his case unconstitutional as an *ex post facto* imposition of punishment.

We find the *Brown* opinion distinguishable from the case before us. *Brown* was written during a unique and dark period of our political history, when irrational fears of "subversives" in our society had reached a fever-pitch. The Court's analysis in *Brown* was pointedly aimed at remedying the legislative hysteria of the preceding decade, which had culminated in legislation explicitly targeting communists. Further, the *Brown* opinion addressed the Bill of Attainder Clause and was not intended as a disposition of an *ex post facto* challenge to this provision. Given the Court's holding only five years earlier in *De Veau*, 363 U.S. at 155-58, where it discussed section 504 at some length and did not fault its application to convicted felons, we find it would be ill-advised to extend *Brown* so as to essentially overturn *De Veau*.

As a final matter, we note that congressional history supports our determination that section 504(a)'s disability provision is not an *ex post facto* imposition of punishment, as applied to convicted felons. In *Brown*, the Court found that Congress's sole intent in promulgating section 504's anti-communist provision was

"to purge the governing boards of labor unions of those whom Congress regard[ed] as guilty of subversive acts and associations." *Brown*, 381 U.S. at 460. In contrast, the congressional history for section 504, as it applies to convicted felons, indicates that members of Congress designed the provision based on a rational desire to protect union members and the public interest from further meddling by union officials who have been convicted for certain conduct. *See* 129 Cong. Rec. 16367-70, Statement of Senator Hatch (purpose of the new provision was not to inflict new punishment but rather to bring relief to the union membership from harm caused by convicted officials); 129 Cong. Rec. 16372, Statement of Senator Nunn (Act does not impose punishment for past criminal conduct and, based on *De Veau* and *Postma*, is on "firm and constitutional ground").

After examining the intent of Congress, the language of the act, and the act's application, we find that the disability imposed on Hughes is not an *ex post facto* imposition of punishment. Because we do not consider the disability imposed on Hughes to be penal in nature, we affirm the district court.

Hughes argues that the Double Jeopardy Clause of the Fifth Amendment precludes his conviction under count thirty-six because the same conduct formed the basis for his conviction under count thirty-four. The government responds that the separate sentences imposed on Hughes for his conviction under counts thirty-four and thirty-six should not be overturned because (1) the submission of a false 1982 W-2 form to the IRS, which is the basis of count thirty-four, is a different offense from the submission of false LM-2 report to the Department of Labor, which is the basis of

count thirty-six; and (2) we may refuse to consider the double jeopardy claim under the concurrent sentencing doctrine.

As an initial matter, we agree with the government that the concurrent sentencing doctrine, which is a discretionary doctrine, applies. *See Dale v. Haeberlin*, 878 F.2d 930, 935 n.3 (6th Cir. 1989). A court should exercise its discretion not to review an issue where it is clear that there is no collateral consequence to the defendant and the issue does not otherwise involve a significant question meriting consideration. *Id.* Hughes is properly subject to the same probationary period and the same section 504(a) union disability for counts thirty-six and thirty-seven. Therefore, because there is no likely collateral consequence to Hughes of being sentenced on both counts, we find no significant legal issue to compel our attention.

We also note that Hughes' claim fails on substantive grounds as well. Hughes argues that 26 U.S.C. §7204 constitutes a lesser included offense of 18 U.S.C. §1001. Section 7204 reads in pertinent part as follows:

> [A]ny person required under the provisions of section 6051 [which requires employers to provide W-2 forms to employees] to furnish a statement who willfully furnishes a false or fraudulent statement or who fails to furnish a statement [violates this provision] . . . .

Section 1001 provides in pertinent part as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations [violates this provision] . . . .

We do not consider the language of section 1001 as precluding a simultaneous conviction for a violation under section 7204. While the statutes could be construed as having some overlap, this is not problematic. Here, the prosecution under section 7204 stems from the filing of a false W-2 form, while the prosecution under section 1001 derives from the filing of falsified "LM-2" reports. These are separate courses of conduct for which separate and discrete sanctions and punishment are applicable. The recent Supreme Court decision of *Grady v. Corbin*, 110 S. Ct. 2084 (1990), expressly permits the government to prosecute a defendant for multiple offenses in a single proceeding. *See also United States v. Louisville Edible Oil Products*, 926 F.2d 584, 588 (6th Cir. 1991); *United States v. Sammons*, 918 F.2d 592, 604-605 n.21 (6th Cir. 1990). In *Edible Oil*, we emphasized that the *Blockburger* test requires a determination of "whether each provision requires proof of an additional fact which the other does not." 926 F.2d at 588 (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). *Grady* does not mitigate our application of the *Blockburger* analysis.

Hughes was convicted under count thirty-four for aiding and assisting in the submission of a false W-2 form, in violation of 26 U.S.C. §7206(2). Hughes' conviction under count thirty-six of the indictment arose from his violation of 18 U.S.C. §1001. Under count thirty-four, the jury found that Hughes, on behalf of Communication Workers of America, had submitted a false W-2 form to the Internal Revenue Service. Under count thirty-six, the jury found that Hughes had caused the Communication Workers of America, in a matter within the jurisdiction of the United States Department of Labor, to submit a false labor report to the

Department of Labor. These are distinct proofs of two separate courses of conduct and simultaneous convictions for both courses of conduct do not violate Hughes' constitutional rights.

Hughes argues that his First Amendment right to associate is violated by the district court's order that he not exercise "any decision-making authority over any organization, committee, or account that receives any of its funds from a labor organization and/or its members for the purposes of contributing money to political candidates." The government responds that the district court is simply exercising its discretion in imposing this condition.

Section 504(a)(5) expressly authorizes the district court to enter an order preventing convicted persons such as Hughes from serving, for up to thirteen years,

> in any capacity, other than in his capacity as a member of such labor organization, that involves decision-making authority concerning or decision-making authority over, or custody of, or control of the moneys, funds, assets, or property of any labor organization . . . .

A trial court has broad discretion in determining the conditions of probation and on appellate review is subject to reversal only for abuse of discretion. *See United States v. Peete*, 919 F.2d 1168, 1181 (6th Cir. 1990). A district court may include conditions that restrict fundamental rights, such as freedom of speech and freedom of association, although in such cases we must review the restrictions with particular care. *Id.* In *Peete*, we found that "[p]robation restrictions may affect fundamental rights such as freedom of speech and freedom of association if the conditions are primarily designed to meet the ends of rehabilitation and protect the public." *Id.*

We find that the restriction on Hughes' authority over union-financed political action committees was reasonably fashioned by the district court to protect union members and the general public from continued abuses by Hughes. An incidental effect of this restriction is that it will also rehabilitate Hughes by removing him from the environment that originally led to his criminal activity. The district court, in crafting a disability order unique to Hughes, has not exceeded the bounds defined in section 504(a)(5). Admittedly, Hughes' ability to exercise his right to associate with political action committees and to participate in an activity in which union members have contributed in their *individual* capacities is limited by the court's order. However, we find this limitation on Hughes' First Amendment rights to be necessary when balanced against the right of the community to have uncorrupted unionfinancing of political action committees. Hughes' conduct following his first sentencing clearly demonstrates that he is still a threat to the public in this regard.

Finally, Hughes argues the district court did not fully credit him for the amount of disability he had already served under section 504(a) since the time of his first sentencing. It should be recalled that we granted Hughes an initial stay of the imposition of this disability on January 13, 1988. Hughes claims he should receive additional credit for time served under the disability, accruing as of April 4, 1990, when our decision on Hughes' first appeal was entered. Hughes argues that our June 12, 1990 order, which continued the original stay while he petitioned for certiorari, applied only to his exercise of civil rights under Ohio state law. Hughes claims that this second order, by implication, caused the resumption of federal disabilities against him.

We reject Hughes' argument that our second stay caused his federal disability period to resume. We find that the section 504(a) disability did not begin to run again until December 5, 1990, which is the date we issued the mandate to the district court ordering re-sentencing. Our memorandum and response to the *second* stay request stated:

> [A] stay of civil and employment disability had been entered by the United States Court of Appeals for the Sixth Circuit prior to the decision in this action .... It is requested that the terms of this stay be *reinstated* pending appeal to the United States Supreme Court. [italics added]

Nothing in this order limited the effect of the original stay or called for the resumption of the federal disability against Hughes.

For the foregoing reasons, we affirm the judgment of the district court.

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed September 5, 1991)

Case No. CR 86-98

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MARTIN J. HUGHES,
Defendant.

ALDRICH, *J.*

MEMORANDUM AND ORDER

On August 1, 1991, this Court sentenced Martin J. Hughes to five (5) years probation for two reinstated felony convictions under 18 U.S.C. §1001. In addition, the Court ordered Hughes to pay the $10,000 fine already imposed, and declined to reduce the thirteen year civil and employment disability automatically imposed by 29 U.S.C. §504. Hughes has moved for a stay of this sentence and a clarification of its terms. The Court denies Hughes' request for a stay and his request for a clarification in its entirety, except for two alterations of his sentence, reducing the probationary period by two (2) years and the disability period by nine (9) months and twenty-six (26) days.

I.

On August 1, 1991, this Court sentenced Hughes to serve five (5) years on probation for his convictions under counts 36 and 37. Hughes had already served two years probation for his conviction under counts 33 and 34 of the indictment. Under the federal probation statute, 18 U.S.C. §3651, the Court is barred from imposing consecutive terms of probation totaling more than five years on separate counts of one indictment. *See United States v. Deffes*, 874 F.2d 1501, 1502 (11th Cir. 1989); *see also United States v. Albano*, 698 F.2d 144, 146 (2nd Cir. 1983); *Fox v. United States*, 354 F.2d 752, 753-54 (10th Cir. 1965). Accordingly, this Court amends its sentencing order of August 1, 1991 and places Hughes on probation for three (3) years for his convictions under 18 U.S.C. §1001.[1]

In addition, the Court amends its sentencing order to properly credit Hughes for time already served under the thirteen-year civil and employment disability automatically imposed by 29 U.S.C. §504. The disability first went into effect on November 13, 1987 when the Court originally sentenced Hughes in this case. On January 13, 1988, the Court of Appeals stayed the imposition of the disability pending appeal. On December 5, 1990, this Court received the mandate of the Court of Appeals, ending the appeals process. The government concedes that Hughes should receive credit for being

[1] Hughes is not entitled to any further reductions in his probationary period or a dismissal of charges based on a violation of the double jeopardy clause, as provided for by *Grady v. Corbin*, _____ U.S. _____, 110 S.Ct. 2084. *Grady* bars successive prosecutions for different offenses involving the same conduct. *Grady* expressly permits the government to prosecute a defendant for multiple offenses in a single proceeding, "thereby avoiding this double jeopardy question." *Grady*, 110 S.Ct. at 2095; *U.S. v. Louisville Edible Oil Products*, 926 F.2d 584, 588 (6th Cir. 1991).

subject to the disability since December 5, 1990, a period of seven (7) months and twenty-six (26) days. Accordingly, this Court amends its sentencing order of August 1, 1991 and reduces Hughes' thirteen-year civil and employment disability automatically imposed by 29 U.S.C. §504 by the nine (9) months and twenty-six (26) days already served when the stay was not in effect.

II.

In sum, the Court denies Hughes' request for a stay and a clarification of the terms of sentence in its entirety, except for two modifications of the August 1st order. The Court orders that:

(1) Hughes shall be placed on probation for three (3) years for each conviction under 18 U.S.C. §1001 to run concurrently with each other;

(2) the thirteen-year civil and employment disability automatically imposed by 29 U.S.C. §504 shall not be reduced, except for the period of nine (9) months and twenty-six (26) days already served.

IT IS SO ORDERED.

/s/ ANN ALDRICH
United States District Judge

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed August 1, 1991)

Case No. 86-98

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MARTIN J. HUGHES,
Defendant.

ALDRICH, *J.*

MEMORANDUM AND ORDER

Martin J. Hughes appears before this Court for re-sentencing, following an appeal of his criminal conviction to the United States Court of Appeals for the Sixth Circuit. On appeal, the Sixth Circuit reinstated two felony convictions, reduced one felony conviction to a misdemeanor conviction, and remanded the case back to this Court with instructions to re-sentence accordingly. A two-day hearing was held to hear evidence pertaining to an appropriate new sentence.

I.

On May 6, 1986, the grand jury issued a thirty-seven count indictment against Martin J. Hughes who was then District 4 vice-president for the Communication Workers of America ("CWA"). The indictment alleged that Hughes submitted to the CWA International office in Washington expense vouchers that falsely claimed reimbursement for mileage and meal expenses for union employees. The government alleged that Hughes received nearly $400,000 in reimbursement funds from the CWA International and used those funds to make political contributions and pay salaries at the United Telephone Credit Union ("UTCU").

In July, 1987, Hughes was tried on these charges, and a jury found him guilty on ten misdemeanor counts of falsifying union records, in violation of 29 U.S.C. §439(c); two felony counts, Counts 33 and 34 of the indictment, of aiding and assisting in the filing of false income tax returns, in violation of 26 U.S.C. §7206(2); and two felony counts, Counts 36 and 37, for making false statements to the United States government through the submission of false labor reporting documents, in violation of 18 U.S.C. §1001.

After the jury returned its verdict, this Court acquitted Hughes of the felony charges in Counts 36 and 37, finding as a matter of law that the false statements made by Hughes were not material. This Court also reduced Hughes' felony conviction under 26 U.S.C. §7206(2) to the lesser included misdemeanor under 26 U.S.C. §7204 in Count 33.

At the original sentencing hearing, held on November 13, 1987, this Court sentenced Hughes to two years probation for each of Counts 33 and 34, to run

concurrently with each other and fined him $10,000, the sum of $1,000 for each of the ten counts of falsifying union records. Moreover, the Court reduced from thirteen years to three years the civil and employment disability automatically imposed by 29 U.S.C. §504 barring Mr. Hughes from representing or serving as an officer in his union.

Both parties appealed to the Sixth Circuit. Pending this appeal, this Court stayed the imposition of the fine. Two months later, on January 13, 1988, imposition of the disability was also stayed by the Sixth Circuit. On appeal, the Sixth Circuit affirmed the conviction and the sentence in its entirety except for two modifications. First, the Circuit ordered that the felony convictions for Counts 36 and 37 be reinstated. Second, the Circuit ordered that the felony conviction for Count 34 be reduced to a misdemeanor. The Circuit then remanded the case back to this Court with instructions to resentence Mr. Hughes accordingly. *See U.S. v. Hughes*, 899 F.2d 1495 (6th Cir. 1990).

II.

For two days, this Court has heard evidence regarding Hughes' conduct since his original sentencing in 1987. This evidence has a bearing on the efficacy of any sentence to be imposed. *See North Carolina v. Pearce*, 395 U.S. 711, 723 (1969). Based on the evidence heard, the Court now makes the following findings of fact.

Three days after his original sentencing, Hughes was dismissed as vice-president of CWA District IV, and replaced by Robert Johnson. Despite this dismissal, Hughes continued to exert control over CWA by maintaining his old office, giving orders to CWA

secretaries, and controlling funds without authorization. The government has presented evidence establishing that Hughes remained in his offices through the summer of 1988, and only left after the union ordered him to leave. Afterwards, the union changed the locks on his doors. Moreover, the government presented evidence establishing that Hughes has exercised unlawful control over union funds in three different accounts, the Ohio Telephone Education Committee ("OTEC") account, the Sundry Disbursements Records ("SDR") account, and the Ohio Action Committee ("OAC") account.

1. *The OTEC account*

On January 17, 1988, four days after his disability was stayed, Hughes began to make withdrawals from the OTEC account without authorization. In total, Hughes withdrew over $482,000 from the account and placed the money in a new account for the Ohio Telephone Education Committee—Public Employees ("OTEC-PE").

OTEC is a political action committee designed to collect funds from union members and distribute them to political candidates. The committee was established in 1957 by the local offices of CWA to fund candidates opposed to right-to-work laws. At that time, Hughes was appointed to run OTEC. The major source of OTEC's funds come from individual CWA members in District IV who designated that a percentage of their dues be disbursed to that account. The funds are collected by the CWA International office, and then sent back to CWA District IV to be deposited in the OTEC account. Before November 1987, Hughes made all the major decisions over the disbursement of OTEC funds to candidates. Since 1985, Peggy Kaufman, a part-time employee at

District IV, acted as the bookkeeper for the OTEC account with sole authorization to sign checks on the account.

Normally, OTEC had only a few thousand dollars in its account. However, in 1986, CWA Local 4389, whose offices were located at the District IV office, decided to disband and contribute all of its funds to OTEC. While not an officer of the local, Hughes took part in the local's officers' meetings and advised them to make this decision. Kaufman, who was also the treasurer of Local 4389, testified that this money was to be earmarked for the purpose of organizing public employees. *See* Government Exhibit 1-3. In fact, Kaufman stated that, in the summer of 1987, Hughes discussed with her the possibility of applying for a federal tax identification number for a new political action committee, the Ohio Telephone Education Committee—Public Employees. However, no federal identification number was ever applied for or granted. In total, Local 4389 contributed $480,930.64 to OTEC and these funds were deposited in the OTEC account.

OTEC's bank records reveal a steady stream of contributions to political candidates during the fall of 1987. As of November 16, 1987, the date of Hughes' conviction, all activity on the account stopped. On January 17 and 18, 1988, however, Hughes directed Kaufman to write checks, totaling $480,830.64, from OTEC to OTEC-PE. On February 24 and 29, 1988, these checks were the first deposits in a new OTEC-PE account.

Hughes made additional deposits in the OTEC-PE account. On January 27, 1988, Hughes directed district IV secretaries to withdraw $1,741.97 from the CWA District IV Sundry Disbursement Records ("SDR")

account. This check was deposited in the OTEC-PE account on May 8, 1988. A check for $1,895.00 from the United Telephone Credit Union ("UTCU") was deposited in the account on August 26, 1988. This amount was a repayment of an amount OTEC-PE paid to UTCU on June 16, 1988. *See* Government Exhibit 2. The government states that this payment was to pay for the legal fees of Gay Griffith, a UTCU employee.[2]

When Robert Johnson learned that Hughes directed the removal of these funds from the OTEC account, he demanded that Hughes return the money immediately. Initially, Hughes responded that these funds were under his control, but he finally agreed that the funds should be returned to the CWA. It was not until August 1988, however, that Hughes provided Johnson with checks to withdraw the entire balance from the OTEC-PE account. Johnson directed Adrian Sifert, a CWA representative, to make the withdrawal of funds from the account, but because Sifert's name was not on the signature card, he could not make any withdrawals. *See* Government Exhibit 5-3. Sifert then met with Hughes on August 24, 1988 to fill out a signature card and write a check for the balance. Hughes delayed the repayment again by stating that he would deliver the signature card and the check to Johnson at the upcoming CWA convention in New Orleans. He did not do so, however. Two weeks later, on September 7, 1988, CWA International Secretary-Treasurer, Jim Booe, telegramed Hughes demanding repayment of the money. *See* Government Exhibit 7.

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[1] Hughes had assisted Ms. Griffith with the preparation of false income tax returns. She was also indicted, but upon the grant of immunity, testified for the government at Hughes' trial.

Finally, on September 9, 1988, Hughes made arrangements to have Sifert and Kaufman co-sign a check, payable to CWA. *See* Government Exhibit 8.[2]

Hughes contends that he did not violate the law, union regulations, or his civil and employment disability when he withdrew money from the OTEC account. He contends that the money was under his control as the appointed manager of OTEC, a position independent from his position at the union. He points to O.R.C. §3517.10 as authority for the proposition that political action committees are legally separate from unions. Hughes asserts that his appointment as the managing officer of OTEC occurred in 1957 when the organization was formed. He asserts that he never lost this authority, and continues to be the managing officer of OTEC to this day.

Nevertheless, the evidence overwhelmingly demonstrates that upon his dismissal as vice-president of district IV, Hughes lost his authority over OTEC when he resigned from his position at the union. In fact, the evidence clearly establishes that since that resignation, Robert Johnson and his assistant, Jeff Rechenbach, have assumed full control of OTEC and its disbursements. Since 1988, Rechenbach has made all of the disbursement decisions regarding OTEC funds (except for the OTEC-PE withdrawals). He has filed all the reporting documents with the Secretary of State. He has even changed the organization's name. Rechenbach has made all of these decisions lawfully, and without ever consulting Hughes or gaining Hughes' permission.

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[2] The funds were never returned to the OTEC account, however. The union decided that, pursuant to union regulations, Local 4389's funds should be disbursed to the locals that took over its jurisdiction after it disbanded.

In addition, there is evidence that CWA's international office no longer recognizes Hughes as the managing officer of OTEC. When it sends collected funds to OTEC, it sends them to Johnson, not Hughes. *See* Government Exhibit 9 (a letter from James Booe, CWA International Secretary-Treasurer to Robert Johnson disbursing funds to District IV for OTEC). Moreover, it is clear that Hughes himself recognizes that he is no longer in control of OTEC. After his departure, Hughes asked Johnson if he could continue to have a hand in disbursement decisions. When asked for the money, Hughes very quickly acknowledged that he did not have the authority to control those funds, and should return them to CWA. Therefore, there is no basis for Hughes' contention that he retained authority over OTEC funds after his dismissal as CWA vice-president.

2. *The SDR account*

Most CWA District IV expenses are paid directly by the CWA International in Washington, D.C. If the district incurs an expense, it pays it out of its SDR account, and sends a receipt to the CWA international office. The international office, then, sends a check reimbursing the SDR account for that amount.

CWA International advances district IV $3,000 with which to pay expenses. However, during his tenure, Hughes would often pay the district's expenses from his own funds or by the use of his own master card. Sandra Christy Sorin, Peggy Kaufman, and Bonnie Lustek, who have all served as bookkeepers for the account, each testified that Hughes was always reimbursed for these expenditures. After his dismissal as vice-president, Hughes approached both Kaufman and Sorin and asked for a check in excess of the balance above the $3,000

advance. Hughes asserted that this excess balance was his personal funds. Kaufman and Sorin both told Hughes that he would need to produce a receipt or bill to demonstrate that money was owed him. He never did. Kaufman and Sorin also testified that the account's excess funds were due to double payments and refunds from vendors. Apparently, at times, CWA would pay a vendor twice for the same bill. It would then get reimbursement for both payments from the Washington office. When the vendor finally returned the second payment, District IV would simply keep it in the SDR account, rather than returning it to the Washington office.

Shortly after Hughes made his request, the district stopped receiving account statements for the SDR account. Kaufman and Sorin checked with the bank and discovered that Hughes had changed the mailing address for the account to his own residence. Johnson then closed the account and moved the funds into a new account at a different bank.

3. *The OAC account*

In early 1989, the CWA District IV office received two IRS forms 1099 from the United Telephone Credit Union for interest on two CWA accounts, the CWA Education Training Fund and the Ohio Action Committee. *See* Government Exhibit 11. The funds were identified by CWA's federal tax number. Upon receipt of the forms, Johnson requested that the accounts be closed. UTCU issued checks for $2,703.48 for the ETF account and $16,524.87 for the OAC account. On March 6, 1989, when CWA attempted to cash these checks, it discovered that a stop payment order had been placed on the check from the OAC account.

Johnson immediately confronted Hughes about the stop payment because the account had previously been under his control. Hughes responded that the money in the OAC account was his, and not the union's. On March 9, 1989, James Booe wrote Gay Griffith, the manager of UTCU, inquiring about the stop payment and demanding full payment of the balance in the OAC account. On March 15, 1989, Kenneth Seminatore, counsel for UTCU, wrote Booe to state that the UTCU believed that the funds in the OAC account were not CWA's, but was a credit union account. Seminatore was told this by Hughes.

The evidence established, however, that the funds in the OAC account were union funds. The account was first begun in December, 1979 with a deposit of $9,900.49. Not so coincidentally, in December, 1979, an account with the name CWA District 4 Action account was closed with a final balance of $9,901.49. Thus, the Court finds that the funds in the OAC account were union funds, and Hughes and UTCU should not have placed a stop payment order on the OAC checks.

III.

Because Hughes' offenses were committed prior to the Sentencing Reform Act of 1984, this Court has broad discretion in which to fashion a new sentence. Essentially, this Court must modify Hughes' sentence to take into account two additional felony convictions for violations of 18 U.S.C. §1001 and a misdemeanor conviction for a violation of 26 U.S.C. §7204 that has been reduced from a felony. In considering the appropriateness of the new sentence, this Court will take into account Hughes' convicted offenses and his conduct since the original sentence was imposed.

First, this Court must sentence Hughes for his violation of 26 U.S.C. §7204 as contained in Count 34 of the indictment. Hughes violated §7204 by furnishing Gay Griffith of UTCU with a false W-2 form. This statute provides for a penalty of $1,000, one year or both. In its original sentence, this Court placed Hughes on probation for two years for a similar misdemeanor conviction under 26 U.S.C. §7204 contained in Count 33 of the indictment. Accordingly, the Court now imposes the same sentence, two years on probation, for the misdemeanor conviction contained in Count 34.

The Court notes, however, that Hughes has already served two years on probation for his felony conviction under Count 34. Under *North Carolina v. Pearce*, 595 U.S. 711, 716 (1969), a punishment already served for an offense must be fully credited when imposing the sentence for a new conviction based on the same offense. Therefore, since Hughes has already served two years on probation for his conviction under Count 34, the Court will credit this time against his new sentence, and deem as already served, the two years of probation he is ordered to serve for this newly entered conviction.

Second, this Court must sentence Hughes for the reinstated felony convictions under 18 U.S.C. §1001 as contained in counts 36 and 37 of the indictment. Section 1001 is a general prohibition against falsifying information given to government agencies. The jury found that Hughes violated section 1001 when he caused the CWA to file false LM-2 reports. These are the annual reports that unions are required to file disclosing, among other things, the salary and expenses of each employee who receives more than $10,000 during the year. The evidence at the trial demonstrated that the LM-2 reports filed by CWA in 1982 and 1983 contained false entries

showing Gay Griffith received $7,995 in 1982 and $10,540 in 1983 as reimbursement for expenses. In fact, these amounts were paid to Griffith as salary and were generated by the false expense vouchers filed with the CWA at the direction of Hughes.

Section 1001 provides for a penalty of up to $10,000, five years, or both. The government has asked that Hughes be incarcerated for these felony convictions. The government has asked for this penalty because it believes that Hughes poses a threat to his union where he can potentially undermine existing authority and interfere with union affairs. Incarceration, however, is not necessary to alleviate this threat. Hughes has already proved that he is a good candidate for probation, and the Court can place conditions on him that keep him from further interfering with his union or their affairs. Therefore, this Court suspends Hughes' sentence and orders him to be placed on five years of probation for each count to run concurrently with each other.

The Court notes that Hughes has already served two years on probation for each of his convictions under Counts 33 and 34 of the indictment. Hughes asks that these two years be credited against any new probationary period imposed under Counts 36 and 37. However, the crediting required by *North Carolina v. Pearce* only applies to circumstances where the defendant's original sentence is vacated, and after a new trial sentenced again for the same offenses. *Id.* at 714. In this case, however, Hughes is being sentenced for two new offenses, felonies which were not even considered at the time of his original sentence. The two years of probation was the penalty imposed for each of Hughes' convictions under counts 33 and 34. While the count 34 conviction was vacated, the count 33 conviction was

affirmed. Thus, the two year probationary period was properly served for that offense, and need not be credited against the new probationary period imposed for new offenses.

This Court must also consider whether in light of the two new felony convictions, it is appropriate to reduce Hughes' civil and employment disability automatically imposed by 29 U.S.C. §504 from thirteen years to three years. 29 U.S.C. §504 provides in pertinent part, that:

> No person who . . . has been convicted of . . . a violation of subchapter III or IV of this chapter [including, among others, a violation of 29 U.S.C. §439], any felony involving abuse or misuse of such person's position or employment in a labor organization . . . or a crime in which any of the foregoing crimes is an element . . . shall not serve or be permitted to serve
>
> (2) as an officer, director, trustee, member of the executive board or similar governing body, business agent, manager, organizer, employer, or representative in any capacity of any labor organization, or
>
> * * *
>
> (4) in a position which entitles its occupant to a share of the proceeds of, or as an officer or administrative employee of, any entity whose activities are in whole or in substantial part devoted to providing goods or services to any labor organization, or
>
> (5) in any capacity other than in his capacity as a member of such labor organization, that involves decision-making authority concerning, or decision-making authority over, or custody of, or control of the moneys, funds, assets, or property of any labor organization,

> during or for the period of thirteen (13) years after conviction or after the end of such imprisonment, whichever is later, unless the sentencing court on the motion of the person convicted sets a lesser period of at least three years after such conviction or after the end of such imprisonment, whichever is later. . . .

The thirteen year disability of §504 is automatically triggered by Hughes' conviction under 18 U.S.C. §1001 since it was a "felony involving the abuse or misuse of Hughes' position in a labor organization." The courts have held that the section should be interpreted liberally in order to give full effect to the efficacy of its provisions. *See Illario v. Frawley,* 426 F.Supp. 1132, 1137 (D.N.J. 1977); *Hodgson v. Chain Service Restaurant,* 355 F.Supp. 180, 184 (S.D.N.Y. 1973).

This Court originally reduced Hughes' automatic disability to three years because it believed Hughes was committed to helping his union. However, in light of Hughes' conduct since his sentencing on November 13, 1987, this Court finds that such a reduction is not appropriate. While Hughes may not have violated his disability (because it was stayed) when he withdrew money from OTEC, changed the mailing address for the SDR account, and stopped payment on the OAC check; his actions demonstrate a general contempt for the existing authority of the union. Because Hughes has been in power at district IV for so long, it is difficult for the new vice-president, his secretaries and assistants to run District IV with Hughes around continually interfering with district funds and operations. In fact, in order to control Hughes, the district officers have been forced to bring in higher union officials, like James Booe, to take action against him. As long as Hughes maintains some area of control within the union and its affiliated

organizations, he will continue to undermine the existing authority and interfere with their efforts to run the CWA.

Section 504 was designed to eradicate this problem. As other courts have stated, the section is designed to "purge the labor movement of its criminal element," *Illario v. Frawley*, 426 F.Supp. at 1137, and prevent them from "(re-)gaining control of union government." *Hodgson*, 355 F.Supp. at 183. By continually interfering with union accounts that undermine existing authority, Hughes has demonstrated the necessity of leaving in tact the full thirteen year disability period imposed by §504 to prevent him from engaging in further interference with union activities.[3]

Hughes' statutorily imposed disability was in effect for two months before it was stayed by the Sixth Circuit on January 13, 1988. Therefore, two months of the disability has already been discharged and can be deducted from this thirteen year period.

Section 504 explicitly bars Hughes from controlling any union funds, including the SDR and OAC accounts. However, there remains some question about whether Section 504 would bar Hughes from controlling the funds of political action committees. Both parties have disputed the issue of whether political action committee funds are tantamount to union funds. Unfortunately, this Court does not have jurisdiction to solve this dispute and issue an order enforcing its interpretation of section 504. The Court does not impose the disability, and thus cannot issue orders concerning how it is to be

[3] The court is not sentencing Hughes to this disability for his actions since the original sentencing. It is merely refusing to reduce a statutorily-required thirteen year period in order to give full effect to §504's provisions.

interpreted and enforced. Under the terms of the statute, the Court's only role, as the sentencing court, is to decide whether or not to reduce the statutory disability period from thirteen to three years. If the government believes that Hughes is violating his disability by controlling the funds of political action committees, its only recourse is to initiate a new and independent criminal action against Hughes under 29 U.S.C. §504(b), which imposes a penalty of up to $10,000, five years, or both for any person who willfully violates this section. *See U.S. v. Jalas*, 409 F.2d 358 (7th Cir. 1969).

Nevertheless, this Court believes that Hughes should be prevented from re-gaining control of political action committees or any other organizations that receive funds from unions and/or its members for the purpose of contributing money to political candidates. Indeed, the driving force behind Hughes' illegal actions in this case was his desire to strengthen and perpetuate his own personal political power through the control and disbursement of political action money. Hughes' actions in conjunction with the OTEC account demonstrate that this desire to control political action money and wield political power remains strong. Therefore, as a condition of his probation, this Court orders that Hughes may not exercise any decision-making authority over any organization, committee, or account that receives any of its funds from a labor organization and/or its members for the purpose of contributing money to political candidates.

Hughes' remaining convictions—ten counts for violations of 29 U.S.C. §439 and one count, Count 33 of the indictment, for violation of 26 U.S.C. §7204—were affirmed by the Sixth Circuit. Therefore, this Court re-affirms the sentence previously imposed for these violations, and notes that the sentence for Count 33 has already been served.

IV.

In sum, this Court orders the following:

(1) the jury felony convictions for violations of 18 U.S.C. §1001 contained in Counts 36 and 37 of the indictment are reinstated;

(2) Hughes is placed on probation for five (5) years for each conviction under 18 U.S.C. §1001 to run concurrently with each other;

(3) as a special condition of this probation, Hughes may not exercise any decision-making authority over any organization, committee, or account that receives any of its funds from a labor organization and/or its members for the purpose of contributing money to political candidates;

(4) Hughes must pay the fine of $10,000 already imposed under the original sentence for the 29 U.S.C. §431 convictions, forthwith;

(5) the felony conviction under 26 U.S.C. §7206(2) contained in Count 34 of the indictment is vacated; in its place, a misdemeanor conviction under 26 U.S.C. §7204 is entered;

(6) since Hughes has already served a sentence for the felony conviction under Count 34, no new sentence will be imposed for the misdemeanor conviction entered in its place;

(7) the thirteen-year civil and employment disability automatically imposed by 29 U.S.C. §504 shall not be reduced, except for the sixty days already served before the stay.

IT IS SO ORDERED.

/s/ ANN ALDRICH
United States District Judge

JUDGMENT AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided and Filed April 4, 1990)

[*RECOMMENDED FOR FULL TEXT PUBLICATION*]
See Sixth Circuit Rule 24

NOS. 87-4052, 87-4069 & 87-4125

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARTIN J. HUGHES,
Plaintiff-Appellant/
Cross-Appellee
(87-4052 & 87-4125),

v.

UNITED STATES OF AMERICA,
Defendant-Appellee/
Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

UNITED STATES OF AMERICA,
Respondent (87-4069),

v.

MARTIN J. HUGHES,
Petitioner.

ON PETITION FOR WRIT OF MANDUMUS.

Before BOGGS and NORRIS, Circuit Judges; ENGEL, Senior Circuit Judge.

ALAN E. NORRIS, Circuit Judge. Defendant, Martin J. Hughes, appeals from his conviction on twelve counts of a thirty-seven-count indictment charging him with various federal criminal offenses. The government also appeals the district court's decisions acquitting defendant on two of the counts and reducing his conviction to a lesser included offense on another count. For the reasons stated below, we affirm the district court's judgment in part and reverse in part.

I.

On May 6, 1986, the grand jury issued a thirty-seven-count indictment against defendant, a district vice-president for the Communications Workers of America, AFL-CIO ("CWA"), charging him with mail fraud, embezzlement, falsification of union records, aiding and assisting in the filing of false W-2 and W-3 forms with the Internal Revenue Service ("IRS"), and with making false statements to the United States through the submission of falsified labor reporting documents. The

government alleged that defendant submitted to the CWA International office expense vouchers that falsely claimed reimbursement for mileage and meal expenses for union employees. The government alleged that defendant received nearly $400,000 in reimbursement funds from the CWA International and used those funds to make political contributions and to pay salaries at the United Telephone Credit Union ("UTCU").

Specifically, the government charged defendant in Counts 1 through 6 and Counts 19 through 23 with mail fraud, in violation of 18 U.S.C. §1341. Counts 7 through 12 and Counts 24 through 28 charged defendant with embezzlement, in violation of 29 U.S.C. §501(c). Counts 13 through 18 and Counts 29 through 32 charged defendant with falsification of union records, in violation of 29 U.S.C. §439(c). Counts 33 through 35 charged defendant with aiding and assisting in the filing of false W-2 and W-3 forms to the IRS, in violation of 26 U.S.C. §7206(2). Finally, Counts 36 and 37 charged defendant with making false statements to the United States through the submission of false labor reporting documents, in violation of 18 U.S.C. §1001.

The case proceeded to trial on July 1, 1987. Before the case was sent to the jury, the district court dismissed Counts 1 through 12 and Counts 19 through 28, the mail fraud and embezzlement charges. After the case had been submitted to the jury, the court dismissed Count 35, one of the tax charges, because of a typographical mistake in the indictment. The jury returned guilty verdicts on each of the remaining counts.

Defendant then moved for acquittal on Counts 33, 34, 36, and 37. The court acquitted defendant of the felony charges in Counts 36 and 37, finding as a matter of law that false statements made by defendant were not

material. The court also reduced defendant's conviction of a felony under 26 U.S.C. §7206(2) to the lesser included misdemeanor under 26 U.S.C. §7204 in Count 33. The court refused to reduce the felony conviction under section 7206(2) in Count 34.

Defendant was sentenced to two years' probation and fined $10,000.

The government appeals the district court's action in acquitting defendant on Counts 36 and 37, and reducing the felony conviction on Count 33.

Defendant appeals the district court's decisions denying his motions for acquittal on Count 34, for recusal, for mistrial, and to dismiss the entire indictment in light of the holding in *McNally v. United States*, 483 U.S. 350 (1987).

II.

A. *The False Statement Counts Under 18 U.S.C. §1001*

The government contends that the district court erred in acquitting defendant on the felony charges under 18 U.S.C. §1001 in Counts 36 and 37, when it concluded as a matter of law that false statements made by defendant were not material.

Section 1001 is a general prohibition against falsifying information given to government agencies, and provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain

> any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Although the statute explicitly mentions materiality only in the first clause, courts have read such a requirement into the second clause as well "in order to exclude trivial falsehoods from the purview of the statute." *United States v. Abadi*, 706 F.2d 178, 180 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983). Under section 1001, a false statement to a federal agency is material even if it does not actually influence a decision of the agency, so long as it has a natural tendency to influence or is capable of influencing a decision of the agency. *United States v. Chandler*, 752 F.2d 1148, 1151 (6th Cir. 1985).

However, materiality "is not an element of the offense that must be proved beyond a reasonable doubt but a 'judicially imposed limitation to ensure the reasonable application of the statute.'" *Chandler*, 752 F.2d at 1151 (quoting *Abadi*, 706 F.2d at 180 n.2.). Accordingly, "materiality is a question of law for the court to decide." *United States v. Keefer*, 799 F.2d 1115, 1126 (6th Cir. 1986). "A materiality determination is subject to complete review on appeal and is not controlled by the clearly erroneous standard." *Chandler*, 752 F.2d at 1151.

In this case, the jury found that the defendant made false statements to the Department of Labor when he caused the CWA to file false LM-2 reports. These are the annual reports that unions are required to file disclosing, among other things, the salary and expenses of each employee who receives more than $10,000 during the year. *See* 29 U.S.C. §431(b)(3). Evidence demonstrated that the LM-2 reports filed by the CWA for 1982 and

1983 contained false entries showing Gay Griffith, the manager of UTCU, as a CWA employee who received $7,995 in 1982 and $10,540 in 1983 as reimbursement for expenses. In fact, these amounts were paid to Griffith as salary and were generated by the false expense vouchers filed with the CWA at the direction of defendant.

The district court found that the false statements were not material. The district court took into consideration that the total amount paid to Griffith was correctly stated, that the misstated amounts were small in relation to the union's total expenses, and the testimony of a labor department official that the chief purpose for requiring these figures was to call attention to persons who were being paid by more than one union and to "adequately describe" the total amount the union paid to each employee. The court also relied upon the fact that the false statements had no effect on any determinations by the Department of Labor, even though the court also noted that the government need not prove such an effect to sustain a conviction under section 1001. Finally, the court considered the fact that Congress had also included in the Labor Management Reporting and Disclosure Act a prohibition against making material false representations in documents required by the Act, but provided that a violation would be punished as a misdemeanor, rather than a felony. 29 U.S.C. §439. The court acknowledged that the United States Supreme Court, in *United States v. Batchelder*, 442 U.S. 114 (1979), held that if two separate laws cover certain criminal activity, the government may prosecute under either law. However, the district court felt that the existence of a misdemeanor statute covering the making of false statements to the Department of Labor was relevant in determining the issue of materiality.

The district court erred in concluding that the false statements were immaterial. The statements were clearly of the type capable of influencing the Department of Labor's information-gathering and regulatory decision-making process. Since Congress specifically required a union to disclose the amounts it disburses in salary and reimbursement expenses for each employee who receives over $10,000, and the LM-2 form provided by the Department of Labor requires the union to separately list the amounts given to an employee for salary and for reimbursed expenses, it follows that a false reporting of information specifically required to be disclosed is material.

The fact that the misstated amounts are relatively small when compared with total union expenditures is not particularly relevant to the issue of materiality. Instead, the relevant inquiry is whether the false information is of the type that is capable of influencing a decision of an agency, as opposed to an examination of the magnitude of the falsehood. *See United States v. Norris*, 749 F.2d 1116, 1121-22 (4th Cir. 1984) (false inclusion of $650 in expense statement totalling $35,584 is material), *cert. denied*, 471 U.S. 1065 (1985). Similarly, the district court's reliance upon the fact that Congress also provided that essentially identical conduct could also be punished as a misdemeanor is misplaced, especially in view of the court having acknowledged that "the false statements do rise to the level of materiality required" to violate the misdemeanor statute. Since the government may bring a prosecution for making a false statement to the Department of Labor under either 18 U.S.C. §1001 or 29 U.S.C. §439, *see United States v. Batchelder*, 442 U.S. at 123-24, and no different standard for determining materiality is set out in the statutes,

there is no basis for concluding that a statement that is material under 29 U.S.C. §439 is not also material under 18 U.S.C. §1001.

Accordingly, we **reverse** the district court's decision acquitting defendant on Counts 36 and 37 of the indictment. Upon remand, the court is instructed to reinstate the jury's felony convictions on these Counts, and to resentence defendant accordingly.

B. *The False W-2 and W-3 Forms*

The government contends that the district court erred in reducing defendant's Count 33 felony conviction under 26 U.S.C. §7206(2) to a misdemeanor conviction under 26 U.S.C. §7204. Defendant contends that the district court erred by refusing to also reduce his felony conviction in Count 34 to a misdemeanor.

1. Count 33

In Count 33, the government charged defendant with aiding and assisting in the filing of a false W-3 wage transmittal form with the IRS. 26 U.S.C. §6051(a) provides that an employer who is required to deduct and withhold taxes from its employees must furnish to each employee a statement, the W-2 form, that sets forth the amount of wages the employee earned and the amount withheld in taxes. 26 U.S.C. §6051(d) provides that the employer must also file a duplicate of the statement with the IRS. This duplicate is the W-3 form.

26 U.S.C. §7206(2) provides, in pertinent part, that a person is guilty of a felony if he

> [w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the

> internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document.

26 U.S.C. §7204 provides that:

> *In lieu of any other penalty provided by law* (except the penalty provided by section 6674) any person required under the provisions of section 6051 to furnish a statement who willfully furnishes a false or fraudulent statement or who willfully fails to furnish a statement in the manner, at the time, and showing the information required under section 6051, or regulations prescribed thereunder, shall, for each such offense, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than one year, or both. (Emphasis added.)

In reducing defendant's section 7206 felony conviction to a section 7204 misdemeanor offense, the district court concluded that section 7204 provides the exclusive sanction against an employer for submitting a false W-3 statement to the IRS and that it was a lesser included offense of that defined in section 7206.

The government argues that section 7204 deals exclusively with statements furnished to employees and does not cover the filing of a false W-3 form with the IRS, pointing to the language in that section providing that it is the exclusive sanction for persons who *furnish* a statement required to be *furnished* under section 6051 and that, while section 6051(a) provides that an employer shall *furnish* a W-2 to each employee, it provides that the W-3 statement shall be *filed* with the IRS.

While we agree with the government that section 7204 clearly is meant to provide the exclusive sanction for an employer who furnishes an employee with a false

W-2 statement, we do not agree that there is any linguistic distinction between furnishing and filing statements that compels our adopting its conclusion that the section does not apply when an employer files a false W-3 form. The W-3 form filed with the IRS is merely a duplicate of the W-2 statement furnished to the employee. When an employer furnishes an employee a false W-2, he necessarily files a false W-3 with the IRS. Under section 6051, an employer is responsible for both forms W-2 and W-3. Accordingly, we would render useless Congress' intent to punish as a misdemeanant a person who provides false information on a statement required by section 6051, if we were to hold that the government may charge an employer with a felony for filing a false W-3 form with the IRS.

2. Count 34

In Count 34, the government alleged that defendant violated section 7206(2) when he did "willfully aid and assist in, and procure, counsel and advise the preparation and presentation to the Internal Revenue Service of a Form W-2 Wage and Tax Statement for Gay Griffith by the Communications Workers of America." The district court held, and the government now concedes, that defendant could not have violated section 7206(2) merely by furnishing Griffith with a false W-2 form, since section 7204 provides the exclusive sanction for this act. However, the district court also found that the jury could have reasonably concluded that defendant took other steps in counseling Griffith to understate her income on her tax return and, therefore, the court refused to reduce defendant's felony conviction under section 7206(2).

However, a fair reading of the evidence would not permit the jury to conclude that defendant took any action with respect to the filing of Griffith's tax return other than causing the CWA to furnish her with a false W-2 form. Griffith expressly denied that defendant gave her any advice concerning the filing of her tax return.

Accordingly, we **affirm** the district court's decision reducing defendant's Count 33 felony conviction to a misdemeanor conviction, and **reverse** the court's denial of a similar reduction with respect to Count 34. Upon remand, the district court is instructed to **vacate** defendant's Count 34 felony conviction and to enter a misdemeanor conviction on that Count and resentence defendant accordingly.

C. *The Recusal Motion*

On two occasions, defendant moved for recusal or disqualification of the district judge, the Honorable Ann Aldrich. In his motions, defendant filed an affidavit stating that, at defendant's request, President Carter signed the final documents approving the appointment of the Honorable George White to the bench of the Northern District of Ohio one day earlier than he signed Judge Aldrich's commission, giving Judge White greater seniority. Judge Aldrich acknowledged that Hughes was responsible for her "lesser seniority" but, nonetheless, denied the motions.

Under 28 U.S.C. §§144 and 455, a judge must recuse herself if a reasonable, objective person, knowing all of the circumstances, would have questioned the judge's impartiality. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194, 2203-05 (1988); *United States v. Story*, 716 F.2d 1088, 1090-91 (6th Cir.

1983). Given the marginal nature of the benefits that a judge receives by having greater seniority, we believe that, under the circumstances of this case, a reasonable, objective person, knowing all the circumstances, would not have questioned Judge Aldrich's impartiality. The "benefits" of which Judge Aldrich was supposedly deprived by her lesser seniority are, in the case at hand, truly de minimis based upon the evidence presented. Based upon the large number and pattern of appointment of judges in the Northern District of Ohio, it is quite implausible that either Judge White or Judge Aldrich would ever become chief judge, with whatever perquisites that might imply. There is not the slightest hint that whatever precedence has existed in items such as office selection, etc., has been of any significance either in fact, or in the estimation of either judge. Thus, it is quite clear that under the circumstances of this case, a reasonable, objective person, knowing all the circumstances, would not have questioned Judge Aldrich's impartiality.

Accordingly, we **affirm** the district court's decision denying defendant's motions for recusal or disqualification.

D. *Defendant's Other Contentions*

Defendant also contends that the district court erred in denying his motion for a mistrial and denying his motion to dismiss the entire indictment in light of the holding in *McNally v. United States*, 483 U.S. 350 (1987). We believe that defendant's arguments with respect to these issues are without merit, and we, therefore, **affirm** the district court's decisions on these remaining issues.

III.

For the foregoing reasons, the judgment of the district court is **affirmed in part and reversed in part**, and this cause is remanded for further proceedings consistent with this opinion.

REFERENCE DATA

Case Name: Hughes v. United States

Case Numbers: 87-4052/4069/4125

Argued: October 6, 1989

Case Below: Ohio D.C. No. CR 86-98 (Aldrich)

Before: Danny J. Boggs and Alan E. Norris, Circuit Judges; Albert J. Engel, Senior Circuit Judge.

Author: Alan E. Norris, Circuit Judge

Counsel for appellant: Percy Squire, Columbus, OH.

Counsel for appellee: John J. Siegel, Cleveland, OH.

FULL COUNSEL

Percy Squire,* Columbus, Ohio, for appellant.

John J. Siegel,* and Christian Stickan,* Assistant United States Attorney, Cleveland, Ohio, for appellee.

Merritt C. Deitz, Jr. (Hughes), Sebree, Kentucky, for appellee.

Michael P. Butler, Assistant Prosecuting Attorney, Cleveland, Ohio, for amicus curiae.

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed November 13, 1987)

Criminal Action No. CR86-98

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MARTIN J. HUGHES,
Defendant.

MEMORANDUM AND ORDER

ALDRICH, *J.*

Defendant Martin J. Hughes moves for acquittal or a new trial on counts 33, 34, 36 and 37 of the indictment. Count 33 relates to the filing of a false W-2 form and count 34 to the filing of a false W-3 form, both in violation of 26 U.S.C. §7206(2), counts 36 and 37 relate to the filing of false LM-2's with the Department of Labor.[1]

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[1] Hughes himself did not file with the government any of the forms in question. The evidence demonstrated that Hughes, by submitting false expense vouchers to the CWA, caused the CWA to incorrectly complete W-2, W-3 and LM-2 forms. The CWA filed the W-3 and LM-2 forms with the government; the CWA furnished the W-2 forms to Gay Griffith, who then filed them with the IRS in connection with her income tax returns.

For the reasons set forth below, with respect to count 33, defendant's motion for acquittal or a new trial is denied; with respect to count 34, defendant will be sentenced under §7204 rather than §7206; and with respect to counts 36 and 37, defendant is acquitted.

I.

A.

Counts 33 and 34

Defendant argues that he should not be convicted under §7206(2), because Congress has specifically provided for a lesser penalty in §7204. §7204 states:

> In lieu of any other penalty provided by law (except the penalty provided by section 6674) any person required under the provisions of section 6051 to furnish a statement who willfully furnishes a false or fraudulent statement or who willfully fails to furnish a statement in the manner, at the time, and showing the information required under section 6051, or regulations prescribed thereunder, shall, for each such offense, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both.

26 U.S.C. §7204 (1982) (emphasis added).

Section §7206 provides:

> (2) Aid or assistance.—[Any person who] [w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document.

. . .

> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

The government contends, in part, that §7204 applies only to the offense of furnishing a false W-2 to an *employee*, and that §7206 may still apply to the separate offense of assisting a person to file a false W-2 with the IRS. In addition, the government contends that §7204 applies only to W-2's and not to W-3's; so that defendant's motion as to count 34 is not well taken.

In order to fully understand the scope of §7204, it is necessary to trace its history, and the history of the sections to which it relates. Section 7204 was originally enacted in 1942 as §470 of the Internal Revenue Code of 1939. An identical provision was enacted in 1943 as §1626(a), and in 1949 was moved to §1643(a).

Congress passed the Revenue Act of 1942 to help fund the war effort. 56 Stat. 798. As part of this act, Congress provided for a "Victory tax," a 5% tax on the gross incomes of most employees. §172 *et seq.* of the Act; 26 U.S.C. §450 et seq. For the first time, this tax was to be collected as wages were earned, rather than in March of the following year, and employers were to be responsible for the collection.

The legislative history of §470 is not extensive, as Congress was more concerned about the severity of the tax and about other matters relating to the war. The Committee reports of both houses of Congress state that the penalties imposed by §470 "are prescribed in lieu of

the penalty imposed by §145[2] of the Code [which relates to the filing of false returns generally] and are much less severe than those displaced." H.R. Rep. No. 2333, 77th Cong., 2d Sess., at 132 (1942); S. Rep. No. 1631, 77th Cong., 2d Sess., at 172 (1942). Section 145's monetary penalty was harsher than that of §7206, but its imprisonment penalty was less, and a violation of §145 was only a misdemeanor, while a violation of §7206 is a felony. Thus it can be fairly said that §7206, the provision in question, is harsher than §145, the provision which Congress in 1942 wished to preempt.

In 1943, Congress amended the tax code to provide for full withholding by employers, the system which exists today. 57 Stat. 126. Congress enacted §1626 to provide the same penalties for violating the general withholding provisions as were applicable to the victory tax withholding provisions. Both houses noted that the new sections were identical to then existing law. H.R. Rep. No. 268, 78th Cong., 1st Sess., at 24 (1943); S. Rep. No. 221, 78th Cong., 1st Sess., at 31.

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[2] Section 145(a) provided:

> (a) Failure to file returns, submit information, or pay tax. Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

Congress also added section §1626(d), which provided that employees shall be liable for criminal penalties if they submit a false withholding form to their employers. Section 1626(d) is the present §7205. The House version of §1626(d) explicitly referred to §145, discussed above. The Senate amendment moved the section from an amendment to §470 to a separate subchapter. In doing so, the Senate noted that it was changing the explicit reference to §145 in the House version to the current language, because it was moving the section from Chapter 1 of the IRS Code to Chapter 9. S. Rep. No. 221, 78th Cong., 1st Sess., at 31.

Section 145(a) did not become §7206 in the 1954 recodification of the Code; rather, similar provisions were enacted as §§7201[3] and 7203.[4] The predecessor of

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[3] §7201. Attempt to evade or defeat tax.

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

[4] §7203. Willful failure to file return, supply information, or pay tax.

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

§7206(2) was §3793(b)[5] which, except for minor differences, is identical to §7206(2), and was contained in Chapter 38, entitled "Miscellaneous Provisions." Section 3793(b) was part of the 1939 Code, having been enacted in 1926. Thus, it can be fairly presumed that Congress intended §3793(b) to be one of the penalties which §1626(a) would be "in lieu of."

The government argues that to hold that only the filing of a false return can support a §7206(2) violation ignores a long line of "10 percenter" cases,[6] where individuals were convicted under §7206(2) for fraudulently filing a form 1099/W-2G. What the government misses is that there is no counterpart to §7204 for a form 1099. No provision of the IRS Code specifies a penalty, in lieu of all others, to be applied for fraudulently completing a form 1099. The Court does not hold that §7206(2) is limited to the filing of an income tax return; rather, it holds only that the "in lieu of any other penalty under law" provision of §7204 means exactly what it says.

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[5] (b) Fraudulent returns, affidavits, and claims

(1) Assistance in preparation or presentation. Any person who willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document, shall (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document) be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

[6] In these cases, an individual agrees to redeem a winning gambling ticket, usually a racing ticket, for another, in return for 10% of the winnings. In this way, the true owner of the ticket does not have to fill out the required Form 1099/W-2G, and, because the IRS would have no matching record against which to check, is able to easily understate his income on his tax return.

As the government states, §7205 is a counterpart to §7204. As stated above, §7205 was originally enacted in 1943 as §1626(d), with the identical "in lieu of" language found here. Section 7205, however, was recently amended. In 1984, as part of the Deficit Reduction Act, Congress deleted the "in lieu of" language of §7205, and substituted the words "in addition to any other penalty." 98 Stat. 494. The Senate report states that the amendment would allow, for example, prosecution under §7201 for willful evasion of taxes, as well as prosecution for the filing of a false W-4 under §7205. H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess., 1001, *reprinted in* 1984 U.S. Code Cong. & Admin. News 751, 995. That this is a clear break from prior law is evinced by the fact that §7201's predecessor was §145, the section under which the 1943 Congress explicitly did not wish the filing of a false W-2 to be prosecuted. The 1984 Congress' attention was certainly drawn to the "in lieu of" language. Although this Court does not give overriding weight to Congress' failure to amend §7204 in 1984, at least an inference can be made that had Congress meant to abolish the "in lieu of" language altogether, it could have done so. Section 7204 is not a section buried in another part of the Code; it is next to, and a counterpart of, §7205.[7]

[7] The Conference agreement regarding the amendment of §7205 states that "No inference should be drawn with respect to the correct interpretation of prior law on this issue," thus negating any inference that this amendment is simply a clarifying amendment, 45 years after the fact. The report goes on to state, however, that "however, to the extent that *United States v. Williams*, 644 F.2d 696 (8th Cir. 1981) might be considered authority to the contrary, the rationale of that decision no longer applies." The only way to make sense of this last phrase is that the Conference Committee was saying not that *Williams*' interpretation of *prior* law was incorrect, but that the *Williams* interpretation is overruled by the amendment. In other words, the amendment is forward-looking only. This comports with the Senate's statement that the amendment is effective for acts and failures to act occurring *after* the date of the amendment.

B.

This, however, does not end the Court's consideration. There are additional questions relating to Counts 33 and 34 which must be answered before the Court can rule on defendant's motion.

Count 33 alleges that Martin Hughes violated §7206(2) by causing the Communications Workers of America to file a false W-3 form with the Internal Revenue Service. Section 7204 is entitled "Fraudulent statement or failure to make statement to employees." Because of that title, the government argues that §7204 covers only W-2 statements furnished to employees, and not W-3 forms which must be filed with the government.

Section 6051, entitled "Receipts for employees", is the substantive provision requiring W-2 forms to be furnished to employees. Subsections (c) and (d) state as follows:

> (c) Additional requirements.—The statements required to be furnished pursuant to this section in respect of any renumeration shall be furnished at such other times, shall contain such other information, and shall be in such form as the Secretary may by regulations prescribed. The statements required under this section shall also show the proportion of the total amount withheld as tax under section 3101 which is for financing the cost of hospital insurance benefits under part A of title XVIII of the Social Security Act.
>
> (d) Statements to constitute information returns.—A duplicate of any statement made pursuant to this section and in accordance with regulations prescribed by the Secretary shall, when required by such regulations, be filed with the Secretary.

The IRS regulations under §6051 require employers to file W-3 forms; 26 C.F.R. §31.6051-2; and thus the forms come within the provisions of §7204.

The historical evidence is also clear. In the Congressional hearings in 1942, the question of employers submitting copies of their employees' receipts (what are now W-2's) to the IRS was considered. The consensus in 1942 was that this practice would be too burdensome on employers. Hence it was decided that full copies would not be necessary, and that instead, employers would be required to submit only a form which summarized the individual receipts (what is now the W-3). S. Rep. No. 3987, 77th Cong., 2d Sess., at 126-28 (Senate Finance Subcommittee Hearing, "Data Relating to the Withholding Provisions of the 1942 Revenue Act"). In enacting §1626 in 1943, Congress intended what were to become the W-3 forms to be covered by the section's "in lieu of" prohibition against other penalties.

Because Congress has provided for a penalty different than that provided in §7206 for the filing of false or fraudulent W-3 forms, and because Congress intended §7204 to replace any penalty otherwise provided by §7206, defendant's conviction of violating §7206 by assisting the CWA to file a false W-3 cannot stand. However, the jury clearly found that Hughes did assist the CWA in filing a false W-3. The Court finds that the violation of §7204 is a lesser included violation of §7206, and so, consonant with defendant's request, Memorandum in Support of Motion for Acquittal at 6, finds him guilty of violating the misdemeanor provisions of §7204. *Cf. United States v. Runnels*, _____ F.2d _____ (6th Cir. Oct. 19, 1987) (defendants convicted on facts jury necessarily found, but on theory not actually presented at trial).

C.

As made clear above, the simple fact of providing, or helping to provide, an individual with a fraudulent W-2 is not punishable under §7206(2) because of §7204's "in lieu of" provisions. However, the evidence at trial showed that Hughes went further than merely providing Griffith with the false W-2's. Based on the evidence presented, the jury could have found beyond a reasonable doubt that Hughes additionally counseled Griffith to understate her income on her income tax return, by reporting as income only that amount shown on the W-2 and not the additional income which she received as "expenses." Defendant himself cites three cases in which persons were convicted for violating §7206(2) by assisting and counseling individuals to file false income tax returns, part of which assistance was to provide the individuals with false W-2 forms. *United States v. MacKenzie*, 777 F.2d 811 (2d Cir. 1986); *United States v. Isaksson*, 774 F.2d 574 (7th Cir. 1984); *United States v. Barnes*, 313 F.2d 325 (6th Cir. 1963). In a sense, the false W-2 form is irrelevant. As long as there are other actions violative of §7206, the fact that the defendant may also have provided an individual with a false W-2 does not prevent a §7206 conviction.

The only remaining question is whether Hughes was indicted for assisting Griffith in preparing a false income tax return, which in part consisted of providing her with a false W-2; or whether Hughes was indicted solely for the act of providing Griffith with a false W-2.

Count 34 alleges:

> 2. That on or about February 16, 1983, the exact date being unknown to the grand jury in the Northern District of Ohio, Eastern Division, MARTIN J. HUGHES, a resident of Rocky River,

> Ohio, did willfully aid and assist in, and procure, counsel and advise the preparation and presentation to the Internal Revenue Service of a Form W-2 Wage and Tax Statement for Gay Griffith by the Communications Workers of America. AFL-CIO (CWA) for the calendar year 1982, which was false and fraudulent as to a material matter, in that the Form W-2 represented that Gay Griffith had received $10,625.00 in wages from the CWA for the calender year 1982 when, in truth and fact, as MARTIN J. HUGHES well knew, the Form W-2 did not report approximately $11,074.00 which the CWA paid to Gay Griffith as expenses but which amount was, in fact, the wages of Gay Griffith; all in violation of Title 26, U.S.C. §7206(2).

The count is hardly a model of clarity. However, the defendant was certainly put on notice that he would be tried on the question of whether he violated §7206(2) by helping to provide Gay Griffith with a false W-2 form. The Court reads Count 34 as charging that the defendant violated §7206 in part by providing Giffith with false W-2's, not that this was his only action allegedly in violation of §7206. The Court also reads Count 34 as charging that Hughes' presentation to the IRS of false forms in violation of §7206, was with forms prepared by the CWA, and not that the CWA itself presented the forms to the IRS. (If the latter interpretation were correct, the charge would fall within the "in lieu of" language of §7204, and a conviction under §7206 would be precluded). This interpretation of the count brings Hughes' actions within §7206, and comports with the three cases cited by the defendant.

Because count 34 can be fairly read to indict Hughes for actions which violate §7206 and which are not barred by the "in lieu of" provision of §7204; because defendant was put on notice that he was being charged with

violating §7206 in connection with providing Griffith with a false W-2; because there was evidence that, and the jury could have found beyond a reasonable doubt that, Hughes violated §7206(2) by counseling Griffith to understate her income, by counseling her to state as income only what appeared on a false W-2, which Hughes himself caused the CWA to prepare; the Court must uphold defendant's conviction under 26 U.S.C. §7206(2).

II.

Counts 36 and 37

Hughes was also indicted under 18 U.S.C. §1001 and §2 for causing the CWA to file false LM-2's. Labor Department regulations require all unions to file LM-2's annually.[8] Section 1001 contains a materiality requirement which is to be decided by the Court. *United States v. Abadi*, 706 F.2d 178 (6th Cir. 1983).

The evidence presented by the government showed that the LM-2's were false in the following respect. The CWA is to list in subsections D and F of Schedule 10 the total wages and expenses, respectively, paid to all persons. These two subsections are then totaled in subsection H, and the amounts for all individuals are totaled on line 8. The total amount paid to Gay Griffith was correctly reported on the LM-2's; what was incorrect was the break-down between wages and expenses. Furthermore, the amount by which the total figures were incorrect was approximately $7,000 out of $19.5 million, or less than one-tenth of 1% of the total. The Labor Department official who testified stated that the chief purpose for requiring these figures was to call attention

[8] 29 C.F.R. §403.1 *et seq.*

to those individuals who were being paid by more than one union and to "adequately describe" the total amount each employee was paid. Tr. 2014-15. As to these purposes, the LM-2's were correct.

The Court previously had great difficulty in deciding the materiality question. *See, e.g.*, Tr. 2794-95; 2807-12. The amounts by which the LM's were false were extremely small. Still, the Court did not wish to label as "immaterial" a figure which Congress requires to be reported, and so the Court denied defendant's motion to find these figures "immaterial", and to therefore strike these two counts of the indictment.

Defendant, in his latest motion, has pointed out to the Court that Congress has enacted penalties explicitly relating to the making of false statements of any matter required to be reported under the Labor Management Reporting and Disclosure Act. 29 U.S.C. §§439(a) and (b).[9] As opposed to 18 U.S.C. §1001, which provides for a criminal sentence of up to 5 years, §§439(a) and (b) are misdemeanor offenses, providing for a sentence of up to one year.

The Court is mindful of *United States v. Batchelder*, 442 U.S. 114 (1979). There, the Supreme Court held that where two separate laws cover the criminal activity of

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[9] Violations and penalties

(a) Willful violations of provisions of subchapter

Any person who willfully violates this subchapter shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(b) False statements or representations of fact with knowledge of falsehood

Any person who makes a false statement or representation of a material fact, knowing it to be false, or who knowingly fails to disclose a material fact, in any document, report, or other information required under the provisions of this subchapter shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

the defendant, the government has the option of which law it wishes to proceed under, and need not prosecute only under the law which provides for the lighter sentence. If that argument were the only basis for defendant's motion, it would have to be denied. Here, however, the Court finds that the false statements which Hughes caused the CWA to make do not rise to the level of "materiality" so as to be prosecutable under §1001. The misstatements are fairly minor, and had no effect on any determinations of the Labor Department (even though such an effect is not necessary for a misstatement to be in violation of §1001. *United States v. Richmond*, 700 F.2d 1183, 1188 (8th Cir. 1983)). And, this Court's earlier concern about finding immaterial the making of a false statement which Congress has required is allayed by Congress' providing the lesser penalty for the making of a false statement under the LMRDA.

Since the Court finds as a matter of law that the false statements made on the LM-2's referred to in counts 36 and 37 do not rise to the level of materiality required by 18 U.S.C. §1001, those counts are dismissed.[10]

III.

Defendant also argues, with respect to all four counts, that there was not sufficient evidence with which the jury could have found him guilty beyond a reasonable doubt. In deciding defendant's motion for acquittal under Fed. R. Crim. P. 29(c), the Court "must

[10] Implicit in this ruling and the Court's earlier ruling is that the false statements do rise to the level of materiality required to be in violation of 29 U.S.C. §439 and thus punishable as misdemeanor offenses. Hughes, however, was not charged under these statutes, and unlike §7204 and §7206, they cannot be considered lesser included offenses of 18 U.S.C. §1001.

view the evidence and all reasonable inferences in the light most favorable to the government." *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Holloway*, 731 F.2d 378, 381 (6th Cir. 1984). If a reasonable juror could fairly find the defendant guilty beyond a reasonable doubt, defendant's motion must be denied. *Holloway*, 731 F.2d at 381. There was more than sufficient evidence presented at trial that Hughes knowingly and willfully caused false expense vouchers to be made out, which caused the CWA to have false records, which in turn caused the CWA to prepare false W-2, W-3 and LM-2 forms. That Hughes caused the forms to be falsely completed and eventually submitted to the government is sufficient to find him guilty, under the various statutes, of assisting in the filing of a false form. *United States v. Kopituk*, 690 F.2d 1289, 1333 (11th Cir. 1982), *cert. denied*, 389 U.S. 1209 (1983); *see also* 26 U.S.C. §7206(2); *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949). Defendant's motion for dismissal or a new trial because of a lack of sufficient evidence is therefore denied.

IT IS SO ORDERED.

/s/ ANN ALDRICH
United States District Judge

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed October 20, 1986)

Criminal Action No. CR86-98

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MARTIN J. HUGHES,
Defendant.

MEMORANDUM AND ORDER

ALDRICH, *J.*

Following this Court's Memorandum and Order of July 25, 1986 denying defendant Martin J. Hughes' "Motion to Disqualify and/or Recuse the Honorable Ann Aldrich" ("recusal motion"), both the United States of America ("the government") and Hughes raise additional issues with respect to the recusal motion. For the reasons set forth below, the Court holds that its prior ruling denying recusal was proper, and it reaffirms its denial of Hughes' motion.

I.

The recusal motion indicates that there are bases for disqualification or recusal under both Title 28 U.S.C. §144 (1982) ("§144") and Title 28 U.S.C. §455 (1982) ("§455"). Title 28 U.S.C. §144 (1982) provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

As amended in 1974, 28 U.S.C. §455 (1982) provides in pertinent part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> * * *

In its Memorandum and Order of July 25, 1986, this Court held that recusal in this case was not permitted by either §144 or §455. Hughes now argues, for the first time, that this Court's decision that Hughes' affidavit was insufficient to support disqualification under §144 was improper because the §144 motion should have been decided by another judge. He cites *United States v. Sibla*, 624 F.2d 864 (9th Cir. 1980), which states:

> Section 144 expressly conditions relief upon the filing of a timely and legally sufficient affidavit. *See Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979); *United States v. Azhocar*, 581 F.2d 735, 738-40 (9th Cir. 1978), *cert. denied*, 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454 (1979); *United States v. Bennett*, 539 F.2d 45, 51 (10th Cir.), *cert. denied*, 429 U.S. 925, 97 S.Ct. 327, 50 L.Ed.2d 293 (1976). If the judge to whom a timely motion is directed determines that the accompanying affidavit specifically alleges facts stating grounds for recusal under section 144, the legal sufficiency of the affidavit has been established, and the motion must be referred to another judge for a determination of its merits. *Azhocar*, 581 F.2d at 738.

Id. at 867. After comparing the purposes and operation of §144 and §455, the Ninth Circuit summarized:

> The net result is that a party submitting a proper motion and affidavit under section 144 can get two bites of the apple. If, after considering all the circumstances, the judge declines to grant recusal pursuant to section 455(a) & (b)(1), the judge still must determine the legal sufficiency of the affidavit filed pursuant to section 144. If that affidavit is sufficient on its face, the motion must be referred to another judge for a determination of its merits under section 144.

Id. at 868. This Court declines to follow *Sibla*, because that decision is contradicted by the plain language of

§144, is inconsistent with the Ninth Circuit precedent upon which it relied and is not the controlling law in the Sixth Circuit Court of Appeals.

Section 144 states that another judge shall be assigned to hear "such proceeding" after the making and filing of a timely and sufficient affidavit of personal bias or prejudice. The word "such" which modifies "proceeding" refers back to "any proceeding in a district court." This first reference to "any proceeding" precedes the discussion of the affidavit which a party is permitted to file. The language "such judge shall proceed no further therein" is susceptible to the construction that a judge must desist from activity in a case as soon as a potentially satisfactory affidavit is filed, thus requiring a colleague to pass upon the affidavit's sufficiency. However, that construction requires that the phrase "another judge shall be assigned to hear such proceeding" signifies consideration of the affidavit. The word "proceeding," then, would possess two different meanings within the same statute—first, referring to the case before the court; second, referring to the ruling on the sufficiency of the affidavit. While such an interpretation of the statute is possible, it is strained and improbable.

Sibla is also unpersuasive because it departs from prior Ninth Circuit precedent without proffering reasons for the change or even recognizing the departure. In *Sibla*, *United States v. Azhocar*, 581 F.2d at 735, is cited as authority for referring a §144 affidavit to another judge. However, review of the prior case reveals that the court rejected the appellant's contention that his §144 motion should have been referred to another judge for hearing. The *Azhocar* court determined that "[o]nly after the legal sufficiency of the affidavit is determined does it

become the duty of the judge to 'proceed no further' in the case." *Id.* at 738 (citations omitted). It noted that its holding was consistent with the statutory language and that a hearing on a §144 motion was unnecessary because the inquiry is limited to the facial allegations of the affidavit. *Id.* It concluded, "[W]hile the statute undoubtedly permits referring the disposition of an affidavit of bias to another judge, the adoption of such a procedure as a general rule would be unwise." *Id.* (citation omitted). Thus, *Sibla's* holding with respect to referral of a §144 affidavit is without support and is contradictory to the sound reasoning of *Azhocar.*

Finally, Hughes has not made the Court aware of any other jurisdiction which has followed the *Sibla* requirement of referral of a motion based upon §144. The Sixth Circuit has not confronted this precise issue. However, the prevailing view among the courts is stated by federal court commentators:

> On its face the statute might seem to contemplate automatic disqualification. It has not been read this way. It is settled that the judge has not only the right but the duty to examine the affidavit and certificate to determine whether they are timely and legally sufficient.
>
> * * *
>
> It has been the common understanding that it is for the judge who is the object of the affidavit to pass on its sufficiency. There are obvious difficulties in asking that judge to make the determination, but no action was ever taken on a 1961 recommendation of the Judicial conference of the United States for legislation to require a judge other than the one against whom the affidavit is filed to pass on its sufficiency. There are a few cases in which a judge has referred the affidavit to the chief judge of his district and asked him to make the determination.

13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §3551 (2d ed. 1984) (footnotes omitted).

The Sixth Circuit's opinion in *Amidi v. Surety Title Agency*, No. 84-3974 (6th Cir. July 1, 1985), is not inconsistent with the prevailing view on this issue. In that case, the appellate court concluded:

> Under the circumstances, and in view of the factual situation set out in the affidavits of appellant and its counsel, we conclude that disqualification of the district judge is indicated applying the reasonable person standard. In the event of further applications for recusal of this judge by the law firm involved, we suggest referral of such application to another district judge for determination.

Slip op. at 4. The *Amidi* court did not indicate either implicitly or explicitly that all recusal motions filed before this Court should be referred to another judge where bias is alleged by lawyers or parties. Hughes was not involved in the *Amidi* motion. Even had *Amidi* not been carefully limited to the specific controversy then before that court, it would be entitled to receive only the limited authoritative force accorded to unpublished opinions by 6th Cir. R. 24(b).[1] Moreover, the *Amidi* court did not indicate that this Court erred procedurally in evaluating the affidavit for itself, but instead held that this Court reached an incorrect result in its evaluation of

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[1] Sixth Cir. R. 24(b) provides:

> Citation of unpublished decisions by counsel in briefs and oral arguments in this court and in the district courts within this circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.
>
> If counsel believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such decision may be cited if counsel serves a copy thereof on all other parties in the case and on the court. Such service may be accomplished by including a copy of the decision in an addendum to the brief.

the affidavits. If this Court were incorrect in passing upon the sufficiency of the affidavits under §144, the appellate court, most logically, would have remanded the case for consideration by another judge, rather than reaching the substance of the appellant's arguments. In the absence of any requirement by the Sixth Circuit that §144 affidavits should be routinely referred to other judges, this Court declines to do so.

II.

The government notes that there may be a genuine issue regarding the propriety of this Court's resolution of the §144 motion without referral to another judge. However, its main concern with the Memorandum and Order of July 25, 1986 is that the Court did not address the statement that it allegedly made to Hughes that it holds him "responsible" for its lesser seniority. The government points out that such a statement carries "heavy implications of intolerance," and it invites this Court to consider the veracity of this part of the affidavit under §455. It cites *Idaho v. Freeman*, 507 F. Supp. 706, 721 (D. Idaho 1981), which states:

> If a judge who is being asked to disqualify himself cannot make all relevant facts known, or rebut those facts that are false and which if left unrefuted would create a reasonable question of impartiality, the result would be an essentially pre-emptive proceeding where the judge would be "the *victim* of the appearance of impropriety . . ." (emphasis added) with no recourse to remove a possible taint on his integrity. Furthermore, allowing a judge the liberty to evaluate the truth, as well as the sufficiency of the alleged facts, is compatible with the Congressional attempt to control bad-faith litigants' manipulation of the disqualification procedure. This is evident because section 144 has attending procedural requirements

to prevent abuse of the disqualification process; section 455 on the other hand permits the judge to edit the inaccurate allegations which could be the basis for disqualification under an appearance of partiality standard.

At this juncture, the Court observes that the procedural safeguards of §144 were not satisfied in this case. Robert J. Rotatori, counsel for Hughes, has not filed a certificate stating that Hughes' affidavit is made in good faith. On this basis alone, Hughes' §144 motion must fail. *Morrison v. United States*, 432 F.2d 1227, 1229 (5th Cir. 1970), *cert. denied*, 401 U.S. 945 (1971). *Cf., Roberts v. Bailar*, 625 F.2d 125, 128 (6th Cir. 1980) (§144 motion was properly denied where plaintiff's counsel, rather than plaintiff, signed and filed the affidavit). *But cf. United States v. Hines*, 696 F.2d 722, 729 (10th Cir. 1982) (§455 motion improperly denied because of failure to file certificate of counsel).

However, the Court also held in its Memorandum and Order of July 25, 1986 that the allegations of the affidavit itself were insufficient to require recusal. The government correctly recognizes that this Court was required to accept the averment regarding "responsibility" as true for the purposes of evaluating the affidavit under §144. *See Berger v. United States*, 255 U.S. 22, 26 (1921). In order to evaluate the facial allegations of the affidavit, the Court construed the word "responsible" to mean that it accepted Hughes' indication that he was the cause of Judge White's "greater seniority" than this Court. It did not understand the word to be fraught with negative implications. Moreover, the Court concluded that the value of seniority in this district is negligible for a reasonable person to believe that this Court could not be impartial to Hughes.

With respect to the §455 motion, the Court likewise does not understand a statement regarding "responsibility" to indicate an attitude involving culpability. Moreover, it evaluates such statement by placing it in the context of a discussion with Hughes, in which Hughes approached the Court to explain his role in procuring the earlier commission for Judge White.[2] In this context, the act of responding to Hughes with such a statement does not carry the negative implications present when one purposely approaches an individual to inform him or her of his or her "responsibility." Instead, it is a normal reaction indicating belief in what has just been stated. In the context of the discussion initiated by Hughes, this Court's alleged statement that she holds Hughes "responsible" does not indicate prejudice or bias. Accordingly, the appearance of impartiality standard applicable under §455 does not require that the Court recuse from this case. The Court therefore reaffirms the conclusion of its Memorandum and Order of July 25, 1986, holding that disqualification or recusal inappropriate.

IT IS SO ORDERED.

/s/ ANN ALDRICH
United States District Judge

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[2] Unlike §144, §455 does not require the Court to accept allegations of the affidavit as true. *Phillips v. Joint Legislative Committee*, 637 F.2d 1014, 1019-20 n. 6 (5th Cir. 1981), *cert. denied*, 456 U.S. 971 (1982); *see Roberts*, 625 F.2d 127 n. 3 (declining to reach the issue of whether the allegations of the affidavit must be accepted under §455). In disposing of the §455 motion in this case, it is unnecessary to dispute any material allegations of Hughes' affidavit. Since the §455 standard asks "what a reasonable person knowing all the relevant facts would think," *Roberts*, 625 F.2d at 129, it is appropriate place the conversation between this Court and Hughes into context. In essence, this Court had never met Hughes before he approached her at an airline gate in 1983 and changed his seat in order to sit next to her. In the ensuing conversation, Hughes told this Court that he had helped Judge White receive his commission earlier and that he meant no harm to this Court by his actions. The Court has no independent knowledge of the events in 1980.

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed July 25, 1986)

Criminal Action No. CR86-98

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MARTIN J. HUGHES,
Defendant.

MEMORANDUM AND ORDER

ALDRICH, *J.*

The defendant in this criminal action, Martin J. Hughes, has filed a "Motion to Disqualify and/or Recuse the Honorable Ann Aldrich." This Court has considered the motion carefully, searching the case law, the facts involved in this motion, and its conscience. For the reasons set forth below, Hughes' motion for recusal or disqualification of this Court is denied.

This Court is convinced that it holds no bias whatsoever against Hughes. However, the standard to be applied in deciding this recusal motion is not a subjective one, but rather an inquiry into what a reasonable person would think about the impartiality of the court. *Amidi v. Surety Title Agency,* No. 84-3974,

slip op. at 4 (6th Cir. July 1, 1985) (quoting *Roberts v. Bailer*, 625 F.2d 125, 129 (6th Cir. 1980)). Under 28 U.S.C. §144, the allegations of Hughes' affidavit must be accepted as true for the purposes of the motion. *Bailer*, 625 F.2d at 127 n. 3. Applying these fundamental principles, the Court will analyze the two reasons advanced by Hughes for its recusal.

First, Hughes' affidavit states, "I met Judge Aldrich on an airplane returning to Cleveland from Washington, D.C. in about September, 1980. At that meeting, she told me that she held me responsible for the fact that she had lesser seniority than Judge White within the federal court." The affidavit explains that Hughes reminded President Carter to sign final documents approving the appointment of the Honorable George White to the bench of the Northern District of Ohio, complying with a request of Senator John Glenn that Hughes should do so. It further explains that President Carter signed Judge White's appointment on June 6, 1980, while this Court was appointed on June 7, 1980.[1] The affidavit states Hughes' belief that "certain administrative court matters, such as allocation of office space, assignment of staff and committee appointments have been decided according to the respective judges' apointment dates."

This Court does hold Hughes responsible for her "lesser seniority" than Judge White, because Hughes advises that this is true. However, it is not likely that any "reasonable person" would perceive "lesser seniority" as of any significant consequence. This

[1] While accepting Hughes' statements as true for purposes of this motion, the Court notes that public records demonstrate that the commissions of Judge White, and seventeen other federal judges, were signed on May 23, 1980, and this Court's commission was signed on May 24, 1980. Seniority dates from the signing of the commission by the president.

district includes nine judges, all of which receive the same salary, set their own hours, control their own dockets, and otherwise enjoy considerable independence. Policy decisions for the court are made by majority vote, and each vote, including that of the chief judge, counts for one. General Order No. 98. The position of chief judge has recently been publicly described by the current incumbent as largely "ceremonial and administrative."

Moreover, no reasonable person could perceive Judge White's "greater seniority" as having anything more than a remote effect on the improbable conglomeration of contingencies that would have to occur for this Court to ever serve as chief judge. The current chief appears hale and hearty and has no known plan to retire. He is followed in seniority by Judge Lambros (age 56), Judge Manos (age 59), Judge White (age 58), and Judge Aldrich (age 59). Under the local rules of this district, one cannot become the chief judge after the age of sixty-five.[2]

Second, Hughes' affidavit discusses this Court's involvement in *Reimer v. Holt*, No. C82-52 (N.D. Ohio filed Jan. 11, 1982), a case in which Hughes was one of thirteen defendants. The affidavit states that Judge

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[2] Other than the potential for becoming chief judge, defendant suggests two additional advantages based on seniority:

> (1) Although facilities are arguably apportioned based upon seniority, no reasonable person could find that this Court is biased because it is located in unsatisfactory chambers. There can be no doubt that this Court enjoys the finest chambers in the federal courthouse, and it has declined to move to new chambers as new judges with lesser seniority have been appointed.
>
> (2) Chairs of committees to administer the court are not awarded based upon seniority. Judge Krenzler, who has less seniority than both Judge White and this Court, is the chairman of the Space and Facilities Committee.

White recused himself from that case, and that Hughes believes that Chief Judge Battisti reassigned the case to Judge Krenzler while the clerk of court, pursuant to the random draw, reassigned it to this Court. Hughes' affidavit concludes, "Judge Aldrich sought and obtained an investigation into the reassignment to Judge Krenzler, apparently suspecting misconduct by court personnel and/or me in the assignment process." It continues that Judge Krenzler retransferred *Reimer* to this Court, which transferred the case to newly appointed Judge Bell within two weeks. A copy of the docket sheet in *Reimer* is attached to the motion.

On this account, the affidavit is totally insufficient. This Court accepts as true the statement that it "caused an investigation" of the reassignment of the case. It finds that a reasonable person would expect any judge to do so.[3] Moreover, the docket sheet does not indicate in any manner that Hughes played any role in the reassignment of the case; in fact, he was merely one of twenty parties to the action. Hughes presents no basis for his belief that this Court "apparently suspect[ed] misconduct by . . . me in the assignment process." The docket sheet indicates only that the practices of the clerk's office were extraordinary and properly the subject of inquiry. This Court was completely satisfied with the resolution of the assignment by Judge Krenzler and Judge Battisti, and it reassigned the case to Judge Bell only because it was a case suitable for distribution to the

[3] Examination of the copy of the docket sheet attached by Hughes reveals that entry number fifty-two had been altered by attempting to "white out" the name of this Court. Prudence dictates at least casual inquiry regarding why such an unusual procedure would be followed by the clerk of court.

docket of a new judge.[4] This Court must find that a reasonable person would not believe it to be prejudiced or biased against Hughes because of abnormalities in the reassignment of the *Reimer* case.

Accordingly, this Court finds Hughes' objections to its perceived impartiality to be meritless. It can only attribute the motion to recuse or disqualify to Hughes' zealous preservation of all possible appeal rights. Defendant is constitutionally entitled to a fair trial on the charges levied against him; he is not entitled to a judge of his choice. *Sinito v. United States*, 750 F.2d 512, 515 (6th Cir. 1984). Hence, this motion for disqualification or recusal must be denied.

IT IS SO ORDERED.

/s/ ANN ALDRICH
United States District Judge

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[4] The attached docket sheet for the *Reimer* case establishes that its pleadings had already become voluminous and its complexity apparent at the time it was reassigned to this Court. Typically, this is the sort of case which any deputy clerk will recommend for reassignment to a new judge's docket.

It should also be noted that the docket sheet shows that twelve days elapsed between the reassignment of the *Reimer* case to this Court and its reassignment to Judge Bell, without the filing of a recusal motion by Hughes or any other party.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed November 21, 1986)

No. 88-3997

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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in Re:

MARTIN J. HUGHES,
Petitioner.

ORDER

BEFORE: KEITH, MERRITT and WELLFORD, *Circuit Judges.*

Petitioner Martin J. Hughes applies for a writ of mandamus directing Judge Ann Aldrich of the United States District Court for the Northern District of Ohio to recuse herself in the criminal trial currently pending before her. Petitioner also moves to stay the district court proceedings or to expedite a ruling on his petition. Judge Aldrich has responded.

This Court has expressly ruled that a motion to recuse or disqualify a district judge is not reviewable in an interlocutory appeal or in a mandamus proceeding, but rather is reviewable only from a final judgment adjudicating the case on the merits. *City of Cleveland v. Krupansky*, 619 F.2d 576, 578 (6th Cir.) (per curiam), *cert. denied*, 449 U.S. 234 (1980); *Albert v. United States District Court*, 283 F.2d 61 (6th Cir. 1980).

It is ORDERED that the petition for writ of mandamus and motion for stay are denied.

ENTERED BY ORDER
OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING

(Filed May 21, 1990)

No. 87-4052/4125/4069

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee
Cross-Appellant,

v.

MARTIN J. HUGHES,
Defendant-Appellant
Cross-Appellee.

In Re:

MARTIN J. HUGHES,
Petitioner.

ORDER

BEFORE: BOGGS and NORRIS, *Circuit Judges;* and ENGEL, *Senior Circuit Judge.*

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having

requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ LEONARD GREEN
Clerk

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT GRANTING MOTION TO STAY ISSUANCE OF MANDATE

(Filed June 12, 1990)

No. 87-4052/4069/4125

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee
Cross-Appellant,

v.

MARTIN J. HUGHES,
Defendant-Appellant
Cross-Appellee.

ORDER

BEFORE: BOGGS and NORRIS, *Circuit Judges;* ENGEL, *Senior Circuit Judge.*

Upon consideration of the motion of the appellant to stay issuance of the mandate pending application to the Supreme Court for writ of certiorari,

It is ORDERED that the motion be and hereby is GRANTED, provided that application for certiorari be effected within thirty (30) days of the date herein. Issuance of the mandate shall then be stayed pending a ruling by the Supreme Court. Denial of certiorari shall result in immediate issuance of the mandate.

Failure to apply for certiorari on a timely basis shall result in issuance of the mandate following the allotted thirty (30) days.

ENTERED BY ORDER
OF THE COURT

/s/ LEONARD GREEN
Clerk

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING

(Filed July 30, 1992)

No. 91-3720

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARTIN J. HUGHES,
Defendant-Appellant.

ORDER

BEFORE: MARTIN and RYAN, *Circuit Judges;* and WILHOIT,* *United States District Judge.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

---

* Hon. Henry R. Wilhoit, Jr. sitting by designation from the Eastern District of Kentucky.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY THE ORDER
OF THE COURT

/s/ LEONARD GREEN
Clerk

18 U.S.C. §1001

§1001. Statements or entries generally

Whenever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

28 U.S.C. §1254

§1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

29 U.S.C. §504

§504. Prohibition against certain persons holding office

(a) Membership in Communist Party; persons convicted of robbery, bribery, etc.

No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, any felony involving abuse or misuse of such person's position or employment in a labor organization or employee benefit plan to seek or obtain an illegal gain at the expense of the members of the labor organization or the beneficiaries of the employee benefit plan, or conspiracy to commit any such crimes or attempt to commit any such crimes, or a crime in which any of the foregoing crimes is an element, shall serve or be permitted to serve—

(1) as a consultant or adviser to any labor organization,

(2) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, employee, or representative in any capacity of any labor organization,

(3) as a labor relations consultant or adviser to a person engaged in an industry or activity affecting commerce, or as an officer, director, agent, or employee of any group or association of employers dealing with any labor organization, or in a position having specific collective bargaining authority or

direct responsibility in the area of labor-management relations in any corporation or association engaged in an industry or activity affecting commerce, or

(4) in a position which entitles its occupant to a share of the proceeds of, or as an officer or executive or administrative employee of, any entity whose activities are in whole or substantial part devoted to providing goods or services to any labor organization, or

(5) in any capacity, other than in his capacity as a member of such labor organization, that involves decisionmaking authority concerning, or decisionmaking authority over, or custody of, or control of the moneys, funds, assets, or property of any labor organization.

during or for the period of thirteen years after such conviction or after the end of such imprisonment, whichever is later, unless the sentencing court on the motion of the person convicted sets a lesser period of at least three years after such conviction or after the end of such imprisonment, whichever is later, or unless prior to the end of such period, in the case of a person so convicted or imprisoned, (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) the United States Parole Commission determines that such person's service in any capacity referred to in clauses (1) through (5) would not be contrary to the purposes of this chapter. Prior to making any such determination the Commission shall hold an administrative hearing and shall give notice of such proceeding by certified mail to the Secretary of Labor and to State, county, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted. The Commission's determination

in any such proceeding shall be final. No person shall knowingly hire, retain, employ, or otherwise place any other person to serve in any capacity in violation of this subsection.

(b) Penalty for violations

Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than five years or both.

(c) Definitions

For the purpose of this section—

(1) A person shall be deemed to have been "convicted" and under the disability of "conviction" from the date of the judgment of the trial court, regardless of whether that judgment remains under appeal.

(2) A period of parole shall not be considered as part of a period of imprisonment.

(d) Salary of office or position of persons convicted placed in escrow.

Whenever any person—

(1) by operation of this section, has been barred from office or other position in a labor organization as a result of a conviction, and

(2) has filed an appeal of that conviction,

any salary which would be otherwise due such person by virtue of such office or position, shall be placed in escrow by the individual employer or organization responsible for payment of such salary. Payment of such salary into escrow shall continue for the duration of the appeal or for the period of time during which such salary would be otherwise due, whichever period is shorter. Upon the

final reversal of such person's conviction on appeal, the amounts in escrow shall be paid to such person. Upon the final sustaining of such person's conviction on appeal, the amounts in escrow shall be returned to the individual employer or organization responsible for payments of those amounts. Upon final reversal of such person's conviction, such person shall no longer be barred by this statute from assuming any position from which such person was previously barred.

(Pub.L. 86-257, Title V, §504, Sept. 14, 1959, 73 Stat. 536; Pub.L. 98-473, Title II, §803, Oct. 12, 1984, 98 Stat. 2133.)

(Pub.L. 100-182, §15(a) which amended this statute is only applicable to offenses committed after Dec. 7, 1987).

Supreme Court, U.S.
FILED
DEC 31 1992
OFFICE OF THE CLERK

No. 92-746

In the Supreme Court of the United States

OCTOBER TERM, 1992

MARTIN J. HUGHES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

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1784

QUESTION PRESENTED

Whether a 1984 amendment to the Labor-Management Reporting and Disclosure Act of 1959, which imposed a 13-year disqualification from serving as a union official on any union employee convicted of a felony involving the misuse of his position to obtain a gain at the expense of the union, violates the Ex Post Facto Clause of the Constitution as applied to a union employee who committed the disqualifying felony before the effective date of the amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-746

MARTIN J. HUGHES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals on appeal from petitioner's resentencing (Pet. App. A2-A17) is reported at 964 F.2d 536. The opinion of the court of appeals on petitioner's initial appeal (Pet. App. A38-A50) is reported at 899 F.2d 1495.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on May 13, 1992. A petition for rehearing was denied on July 30, 1992 (Pet. App. A86-A87). The petition for a writ of certiorari was filed on October 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on ten counts of falsification of union records, in violation of 29 U.S.C. 439(c); two counts of filing false W-2 and W-3 forms with the Internal Revenue Service (IRS), in violation of 26 U.S.C. 7206(2); and two counts of making false statements to the United States through the submission of false labor reporting documents, in violation of 18 U.S.C. 1001. Following the verdict, the district court granted petitioner's motion for a judgment of acquittal on the two Section 1001 counts. Petitioner was sentenced to two years' probation on the tax counts and fined $10,000 on the ten counts of falsifying union records. In addition, petitioner was subject to an employment disability under 29 U.S.C. 504(a), barring him from representing or serving as an officer of the Communication Workers of America for three years. Pet. App. A22-A23, A39-A41.

On appeal, the court of appeals reinstated the two Section 1001 convictions and ordered the district court to reduce the felony conviction on one of the tax counts to a misdemeanor. Pet. App. A41-A45, A47-A48. Thereafter, petitioner sought a writ of certiorari from this Court, and the Court denied the writ. 111 S. Ct. 508 (1990). On resentencing, the district court sentenced petitioner to an additional three years' probation on the Section 1001 counts and increased his employment disability from three to 13 years. Pet. App. A34-A35. The court of appeals affirmed. *Id.* at A17.

1. The evidence at trial showed that petitioner was a manager of a branch office of the Communication Workers of America (CWA). In that capacity, he submitted office expense vouchers to the CWA that falsely claimed reimbursement for mileage and meal expenses for union employees. The CWA paid him nearly $400,000 in reimbursement funds, which he used to make political contributions and to pay salaries at the United Telephone Credit Union (UTCU). Pet. App. A39-A40. In addition, petitioner caused the CWA to file reports with the Department of Labor falsely representing Gay Griffith to be a CWA employee who received $7,995 in 1982 and $10,540 in 1983 as reimbursement for expenses. In fact, Griffith, the manager of the UTCU, received those amounts as salary from funds generated by the false expense vouchers filed at the direction of petitioner. *Id.* at A42-A43. Petitioner also caused the CWA to file false W-2 and W-3 forms for Griffith with the IRS. *Id.* at A45, A47.

2. Petitioner was convicted on the Section 1001 counts in November 1987. The convictions were based on conduct occurring in 1982 and 1983. At the time of petitioner's criminal activity, Section 504(a) of the Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 536-537 (codified at 29 U.S.C. 504(a) (1982)), prohibited persons convicted of certain specified criminal offenses from engaging in union activities for five years after their term of imprisonment ended.[1] In 1982 and 1983, however,

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[1] Section 504(a) provided in relevant part:

> No person who is or has been a member of the Communist Party or who has been convicted of, or served any part

Section 1001 offenses were not among the crimes giving rise to the disability. Pet. App. A8-A9.

In 1984, Congress amended the Act by adding to the offenses giving rise to the disability "any felony involving abuse or misuse of [a] person's position or employment in a labor organization * * * to seek or obtain an illegal gain at the expense of the members of the labor organization." Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 803, 98 Stat. 2133. See 29 U.S.C. 504(a). That language subjects persons who are found guilty of violating Section 1001 to the disability when, as here, the violation of Section 1001 is part of a scheme to obtain union funds unlawfully. The amendment, which became effective on October 12, 1984, applies to any judgment of convic-

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> of a prison term resulting from his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, or conspiracy to commit any such crimes, shall serve--
>
> > (1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization, * * *
> >
> > * * * * *
>
> during or for five years after the termination of his membership in the Communist Party, or for five years after such conviction or after the end of such imprisonment * * *.

29 U.S.C. 504(a) (1982).

tion entered after October 12, 1984, notwithstanding the date of the conduct that constituted the offense. Pub. L. No. 98-473, § 804, 98 Stat. 2134. See 29 U.S.C. 504(a) note.

3. On appeal, petitioner contended that application of the 1984 amendment to persons like himself whose false statements were made before the effective date of the 1984 amendment would violate the Ex Post Facto Clause of the Constitution, Art. I, § 9, Cl. 3. In rejecting that claim, the court of appeals concluded that the amendment did not designate punishment for past acts, but instead was "a legislative device aimed at strengthening regulations in an area susceptible to corruption." Pet. App. A9. The court relied on decisions of this Court that held similar forms of legislation to be non-penal, including *De Veau* v. *Braisted*, 363 U.S. 144 (1960); *Flemming* v. *Nestor*, 363 U.S. 603 (1960), and *Hawker* v. *New York*, 170 U.S. 189 (1898).

The court of appeals rejected petitioner's argument that this case was controlled by *United States* v. *Brown*, 381 U.S. 437 (1965). *Brown* held that another portion of Section 504(a), which disqualified members of the Communist Party from serving as officers or employees of a labor union, inflicted punishment within the meaning of the Bill of Attainder Clause of the Constitution. 381 U.S. at 458. The court of appeals observed that this Court's analysis in *Brown* "was pointedly aimed at remedying the legislative hysteria of the preceding decade, which had culminated in legislation explicitly targeting communists." Pet. App. A11. The court also noted that *Brown* addressed the Bill of Attainder Clause and "was not

intended as a disposition of an *ex post facto* challenge." Pet. App. A11. Finally, the court explained that, whereas the Court in *Brown* found that Congress intended the anti-communist provision of Section 504(a) to be penal in nature, the legislative history of the convicted felon provision indicates that it was not designed to inflict punishment, but rather to "protect union members and the public interest from further meddling by union officials who have been convicted for certain conduct." Pet. App. A11-A12. The court concluded that "it would be ill-advised to extend *Brown* so as to essentially overturn *De Veau*." Pet. App. A11.

ARGUMENT

Petitioner renews his contention that his employment disability under Section 504(a) violates the Ex Post Facto Clause because he committed the Section 1001 offenses before the effective date of the 1984 amendment of the statute.

1. The Ex Post Facto Clause provides that Congress may not "punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed." *Collins* v. *Youngblood*, 497 U.S. 37, 52 (1990); see *Dobbert* v. *Florida*, 432 U.S. 282, 292 (1977); *Beazell* v. *Ohio*, 269 U.S. 167, 169-170 (1925); *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (opinion of Justice Chase). The purpose of the prohibition is "to assure that legislative Acts give fair warning of their effect and permit individuals to rely

on their meaning until explicitly changed." *Weaver* v. *Graham*, 450 U.S. 24, 28-29 (1981).

Not every statute that brings adverse consequences to bear on an individual for previous conduct violates the Ex Post Facto Clause. The question in each case is "whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession." *De Veau* v. *Braisted*, 363 U.S. 144, 160 (1960). See also *Flemming* v. *Nestor*, 363 U.S. 603, 614 (1960) ("[w]here the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected"); *Hawker* v. *New York*, 170 U.S. 189, 200 (1898) ("such legislation is not to be regarded as a mere imposition of additional penalty, but as prescribing the qualifications for the duties to be discharged and the position to be filled").[2]

Thus, in *De Veau*, the petitioner challenged on ex post facto grounds the retroactive application of a New York statute that barred any person who had

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[2] In *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 475-476 (1977) (footnote and citations omitted), the Court held that determining whether a statute is a bill of attainder requires an analysis of "whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes. Where such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers."

been convicted of a felony from holding office in any waterfront labor organization. This Court examined the statute's legislative history and determined that "New York sought not to punish ex-felons, but to devise what was felt to be a much-needed scheme of regulation of the waterfront, and for the effectuation of that scheme it became important whether individuals had previously been convicted of a felony." 363 U.S. at 160. Because the purpose of the statute was regulatory rather than punitive, the Court held that its retroactive application did not violate the Ex Post Facto Clause. *Ibid.*[3]

Like the statute at issue in *De Veau*, the purpose of the 1984 amendment to Section 504(a) was not penal in nature. Rather, the amendment was designed "to afford unions * * * greater protection from corrupt union and management officials." S. Rep. No. 225, 98th Cong., 1st Sess. 297 (1983). As Sen. Hatch, one of the chief sponsors of the legislation, explained, "[t]he purpose of the retroactive provision * * * is not to inflict new punishment. It is intended to bring immediate relief to the union rank and file from abuse by convicted officials." 129 Cong. Rec. 16,371 (1983).[4]

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[3] Similarly, in *Flemming*, the Court held that a federal statute terminating social security benefits to an alien who was deported on certain specified grounds was not an ex post facto law, and in *Hawker*, the Court reached the same conclusion with respect to a New York statute prohibiting previously convicted felons from practicing medicine.

[4] Likewise, the legislative history of the 1959 Act indicates that the employment disqualification was

> not conceived by the committee as additional punishment for the crimes mentioned in the section. The punishment of these kinds of crimes and the enactment of laws relating

The legislative history of the 1984 amendment shows that, in providing that the amendment should apply retroactively, Congress was well aware of the prohibitions of the Ex Post Facto Clause, but concluded, chiefly on the authority of *De Veau*, that the statute "stands upon firm constitutional ground." 129 Cong. Rec. 16,372 (1983) (remarks of Sen. Nunn). See also *ibid.* (remarks of Sen. Nunn) ("the bill [does not] impose punishment for past acts in violation of the prohibition of ex post facto law"). In light of the regulatory purpose of the amendment, the court of appeals correctly concluded that "the disability imposed on [petitioner] is not an *ex post facto* imposition of punishment." Pet. App. A12. See *Postma* v. *International Bhd. of Teamsters, Local 294*, 337 F.2d 609 (2d Cir. 1964) (upholding retroactive application of the employment disability to convicted felons in the 1959 version of Section 504(a)).[5]

2. Petitioner's reliance (Pet. 10-11, 14-15) on *United States* v. *Brown*, 381 U.S. 437 (1965), is misplaced. In *Brown*, the Court held that the provision of

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> to them are and should be the province of the States. This provision is designed to further protect union members' and the public interest by establishing certain standards for persons holding union office.

S. Rep. No. 187, 86th Cong., 1st Sess. 49 (1959).

[5] Petitioner asserts that *Postma* is of no relevance because it was decided prior to this Court's decision in *Brown*. Pet. 14 n.4. *Postma*, however, was decided after this Court's decisions in *De Veau*, *Flemming*, and *Hawker*, and the Second Circuit in *Postma* expressly found *De Veau* to be "dispositive." 337 F.2d at 611. As argued below, there is no basis for concluding that this Court in *Brown* overruled *De Veau*, *Flemming*, and *Hawker sub silentio*. *Postma* thus remains good law.

Section 504(a) that makes it a crime for a former member of the Communist Party to hold union office was a bill of attainder. In so holding, the Court concluded that that provision "inflicts 'punishment' within the meaning of the Bill of Attainder Clause." 381 U.S. at 458. In petitioner's view, the Court's conclusion that the anti-communist provision of Section 504(a) "inflicts 'punishment' " for purposes of analyzing whether it is a bill of attainder establishes that the provisions of Section 504(a) imposing the same disability on the specified classes of convicted felons "make more burdensome the punishment for a crime," *Collins* v. *Youngblood*, 497 U.S. at 52, for purposes of ex post facto analysis.

Petitioner's view is mistaken. The Court in *Brown* relied on the fact that Congress "cannot specify the people upon whom the sanction it prescribes is to be levied," 381 U.S. at 461, and that Section 504(a)'s proscription on former communists "does not set forth a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics * * * shall not hold union office." 381 U.S. at 450. In enacting the proscription on former communists, Congress failed to specify any acts or characteristics on the basis of which it intended to regulate union governance, but instead simply identified an organization whose members it sought to disable. In light of Congress's failure to articulate a regulatory objective, "it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers." *Nixon* v. *Administrator of General Services*, 433 U.S. at 476. Accordingly, the Court in *Brown* found

no need to discuss *De Veau*, *Flemming*, and *Hawker*, in all of which Congress had articulated a valid regulatory goal. See 381 U.S. at 452 n.26.

This case is governed by *De Veau*, *Flemming*, and *Hawker*, not by *Brown*. The portion of Section 504(a) at issue in this case *does* specify certain specific acts —the "misuse of [a] person's position or employment in a labor organization * * * to seek or obtain an illegal gain at the expense of the members of the labor organization," 29 U.S.C. 504(a)—whose commission would, in Congress's view, render the offender a threat to labor unions and their members. That determination was certainly not irrational, nor is there any basis to conclude that it was merely a pretext for the imposition of additional criminal punishment for previously committed offenses.[6]

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[6] The only source petitioner cites for the proposition that the disability at issue was intended to be penal in nature is a congressional report that, petitioner asserts, stated that the disability was imposed "to increase available penalties because the penalties used to protect labor relations had proven to be 'inadequate.'" Pet. 9-10. (Petitioner incorrectly cites H. Rep. No. 1030, 98th Cong., 2d Sess. 297-299 (1984). That report does not mention or discuss any of the provisions of the Comprehensive Crime Control Act of 1984. The correct citation is S. Rep. No. 225, 98th Cong., 1st Sess. 297 (1983), a Senate report on a precursor bill). The word petitioner quotes from the report is taken out of context from the following sentence: "Current Federal *prohibitions and* penalties designed to protect the legitimacy of labor relations have, in certain respects, proved to be inadequate." S. Rep. No. 225, *supra*, at 297 (emphasis added). That sentence generally explained a number of provisions of the Comprehensive Crime Control Act of 1984, including the amendment to Section 504(a). The disability imposed by Section 504(a) is a regulatory "prohibition * * *

Therefore, the portion of Section 504(a) at issue in this case is appropriately viewed as regulatory, not punitive.

3. Nor is petitioner helped by *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277 (1867), or *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867), which he also cites. See Pet. 12-13. In those cases, the Court was confronted with challenges under the Ex Post Facto Clause to statutes excluding persons from practicing a profession based on conduct preceding the enactment of the statutes. The Court concluded in each case that the statute at issue violated the Ex Post Facto Clause, finding that the legislative purpose in enacting it was to inflict punishment for the past conduct. *Cummings*, 71 U.S. (4 Wall.) at 320, 327-329; *Gar-land*, 71 U.S. (4 Wall.) at 377-378, 380.

Hawker v. *New York* establishes that *Cummings* and *Garland* do not govern this case. In *Hawker*, the Court upheld the retroactive application of a New York statute making it a crime for a previously convicted felon to practice medicine. In reaching that conclusion, the Court reasoned that "[t]he State is not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character." 170 U.S. at 196. The Court distinguished *Cummings* and *Garland* on the ground that the statutes in those cases "were designed to deprive parties of their right to continue in their professions for past acts * * *, many of which had no bearing upon their fitness to continue in their professions." 170 U.S. at 198-199

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designed to protect the legitimacy of labor relations," not a "penalty."

(quoting *Dent* v. *West Virginia*, 129 U.S. 114, 128 (1889)). As we have shown, the 1984 amendment to Section 504(a) was of the regulatory type at issue in *Hawker*, not the punitive type at issue in *Cummings* and *Garland*.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] Likewise unavailing is petitioner's reliance (Pet. 9, 14 n.4) on *United States* v. *Jalas*, 409 F.2d 358 (7th Cir. 1969). In that case, the court of appeals held that the government has no standing to seek an injunction barring a person disqualified under Section 504(a) from holding union office. The court explained that Section 504(a) is "a criminal statute contemplating proceeding by indictment or information." 409 F.2d at 360. The fact that it is a criminal offense to hold union office in violation of Section 504(a) has no bearing on whether the disqualification in Section 504(a) is a criminal punishment.